# CUSTOMS BULLETIN AND DECISIONS

***Weekly Compilation of***

***Decisions, Rulings, Regulations, Notices, and Abstracts***

***Concerning Customs and Related Matters of the***

***U.S. Customs Service***

***U.S. Court of Appeals for the Federal Circuit***

***and***

***U.S. Court of International Trade***

**VOL. 34 NOVEMBER 1, 2000 NO. 44**

*This issue contains:*



DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

## NOTICE

The decisions, rulings, regulations, notices and abstracts which are published in the Customs Bulletin are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Office of Finance, Logistics Division, National Support Services Center, Washington, DC 20229, of any such errors in order that corrections may be made before the bound volumes are published.

**Please visit the U.S. Customs Web at:**
**http://www.customs.gov**

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402

# U.S. Customs Service

## *General Notice*

### LIST OF FOREIGN ENTITIES VIOLATING TEXTILE TRANSSHIPMENT AND COUNTRY OF ORIGIN RULES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: General notice.

SUMMARY: This document notifies the public of foreign entities which have been issued a penalty claim under section 592 of the Tariff Act of 1930, for certain violations of the customs laws. This list is authorized to be published by section 333 of the Uruguay Round Agreements Act.

DATES: This document notifies the public of the semiannual list for the 6-month period starting October 1, 2000, and ending March 30, 2001.

FOR FURTHER INFORMATION CONTACT: For information regarding any of the operational aspects, contact Mirta Gonzalez, Seizures and Penalties Division, Office of Field Operations, (202)927-0410. For information regarding any of the legal aspects, contact Willem A. Daman, Office of Chief Counsel, (202)927-6900.

SUPPLEMENTARY INFORMATION

BACKGROUND

Section 333 of the Uruguay Round Agreements Act(URAA)(Public Law 103-465, 108 Stat. 4809)(signed December 8, 1994), entitled Textile Transshipments, amended Part V of title IV of the Tariff Act of 1930 by creating a section 592A (19 U.S.C. 1592a), which authorizes the Secretary of the Treasury to publish in the **Federal Register,** on a semiannual basis, a list of the names of any producers, manufacturers, suppliers, sellers, exporters, or other persons located outside the Customs territory of the United States, when these entities and/or persons have been issued a penalty claim under section 592 of the Tariff Act, for certain violations of the customs laws, provided that certain conditions are satisfied.

The violations of the customs laws referred to above are the following: (1) Using documentation, or providing documentation subse-

quently used by the importer of record, which indicates a false or fraudulent country of origin or source of textile or apparel products; (2) Using counterfeit visas, licenses, permits, bills of lading, or similar documentation, or providing counterfeit visas, licenses, permits, bills of lading, or similar documentation that is subsequently used by the importer of record, with respect to the entry into the Customs territory of the United States of textile or apparel products; (3) Manufacturing, producing, supplying, or selling textile or apparel products which are falsely or fraudulently labeled as to country of origin or source; and (4) Engaging in practices which aid or abet the transshipment, through a country other than the country of origin, of textile or apparel products in a manner which conceals the true origin of the textile or apparel products or permits the evasion of quotas on, or voluntary restraint agreements with respect to, imports of textile or apparel products.

If a penalty claim has been issued with respect to any of the above violations, and no petition in response to the claim has been filed, the name of the party to whom the penalty claim was issued will appear on the list. If a petition or supplemental petition for relief from the penalty claim is submitted under 19 U.S.C. 1618, in accord with the time periods established by sections 171.2 and 171.61, Customs Regulations (19 CFR 171.2, 171.61) and the petition is subsequently denied or the penalty is mitigated, and no further petition, if allowed, is received within 60 days of the denial or allowance of mitigation, then the administrative action shall be deemed to be final and administrative remedies will be deemed to be exhausted. Consequently, the name of the party to whom the penalty claim was issued will appear on the list. However, provision is made for an appeal to the Secretary of the Treasury by the person named on the list, for the removal of its name from the list. If the Secretary finds that such person or entity has not committed any of the enumerated violations for a period of not less than 3 years after the date on which the person or entity's name was published, the name will be removed from the list as of the next publication of the list.

## REASONABLE CARE REQUIRED

Section 592A also requires any importer of record entering, introducing, or attempting to introduce into the commerce of the United States textile or apparel products that were either directly or indirectly produced, manufactured, supplied, sold, exported, or transported by such named person to show, to the satisfaction of the Secretary, that such importer has exercised reasonable care to ensure that the textile or apparel products are accompanied by documentation, packaging, and labeling that are accurate as to its origin. Reliance solely upon information regarding the imported product from a person named on the list is clearly not the exercise of reasonable care. Thus, the textile and apparel importers who have some commercial relationship with one or more of the listed parties must exercise a degree of

reasonable care in ensuring that the documentation covering the imported merchandise, as well as its packaging and labeling, is accurate as to the country of origin of the merchandise. This degree of reasonable care must involve reliance on more than information supplied by the named party.

In meeting the reasonable care standard when importing textile or apparel products and when dealing with a party named on the list published pursuant to section 592A of the Tariff Act of 1930, an importer should consider the following questions in attempting to ensure that the documentation, packaging, and labeling is accurate as to the country of origin of the imported merchandise. The list of questions is not exhaustive but is illustrative.

1) Has the importer had a prior relationship with the named party?

2) Has the importer had any detentions and/or seizures of textile or apparel products that were directly or indirectly produced, supplied, or transported by the named party?

3) Has the importer visited the company's premises and ascertained that the company has the capacity to produce the merchandise?

4) Where a claim of an origin conferring process is made in accordance with 19 CFR 102.21, has the importer ascertained that the named party actually performed the required process?

5) Is the named party operating from the same country as is represented by that party on the documentation, packaging or labeling?

6) Have quotas for the imported merchandise closed or are they nearing closing from the main producer countries for this commodity?

7) What is the history of this country regarding this commodity?

8) Have you asked questions of your supplier regarding the origin of the product?

9) Where the importation is accompanied by a visa, permit, or license, has the importer verified with the supplier or manufacturer that the visa, permit, and/or license is both valid and accurate as to its origin? Has the importer scrutinized the visa, permit or license as to any irregularities that would call its authenticity into question?

The law authorizes a semiannual publication of the names of the foreign entities and/or persons. On March 30, 2000, Customs published a Notice in the **Federal Register** (65 FR 17003) which identified 25 (twenty-five) entities which fell within the purview of section 592A of the Tariff Act of 1930.

## 592A LIST

For the period ending September 30, 2000, Customs has identified 24 (twenty-four) foreign entities that fall within the purview of section 592A of the Tariff Act of 1930. This list reflects one new entity and two removals to the 25 entities named on the list published on March 30, 2000. The parties on the current list were assessed a penalty claim under 19 U.S.C. 1592, for one or more of the four above-de-

scribed violations. The administrative penalty action was concluded against the parties by one of the actions noted above as having terminated the administrative process.

The names and addresses of the 24 foreign parties which have been assessed penalties by Customs for violations of section 592 are listed below pursuant to section 592A. This list supersedes any previously published list. The names and addresses of the 24 foreign parties are as follows (the parenthesis following the listing sets forth the month and year in which the name of the company was first published in the **Federal Register**):

Austin Pang Gloves & Garments Factory, Ltd., Jade Heights, 52 Tai Chung Kiu Road, Flat G, 19/F, Shatin, New Territories, Hong Kong. (10/99)

Beautiful Flower Glove Manufactory, Kar Wah Industrial Building, 8 Leung Yip Street, Room 10-16, 4/F, Yuen Long, New Territories, Hong Kong. (10/99)

BF Manufacturing Company, Kar Wah Industrial Building, Leung Yip Street, Flat 13, 4/F, Yeun Long, New Territories, Hong Kong. (10/99)

Ease Keep, Ltd., 750 Nathan Road, Room 115, Kowloon, Hong Kong. (10/99)

Excelsior Industrial Company, 311-313 Nathan Road, Room 1, 15th Floor, Kowloon, Hong Kong. (9/98)

Eun Sung Guatemala, S.A., 13 Calle 3-62 Zona Colonia Landivar, Guatemala City, Guatemala. (3/98)

Everlast Glove Factory, Goldfield Industrial Centre, 1 Sui Wo Road, Room 15, 15th Floor, Fo Tan, Shatin, New Territories, Hong Kong. (3/99)

Fabrica de Artigos de Vestuario E-Full, Lda. Rua Um doi Bairro da Concordia, Deificio Industrial Vang Tai, 8th Floor,
A-D, Macau. (10/99)

Fabrica de Artigos de Vestuario Fan Wek Limitada, Av. Venceslau de Morais, S/N 14 B-C, Centro Ind. Keck Seng (Torre 1), Macau. (10/99)

Fabrica de Artigos de Vestuario Pou Chi, Avenida General Castelo Branco, 13, Andar, "C" Edificio Wang Kai, Macau. (10/99)

Glory Growth Trading Company, No.6 Ping Street, Flat 7-10, Block A, 21st Floor, New Trade Plaza, Shatin, New Territories, Hong Kong. (9/98)

G.P. Wedding Service Centre, Lee Hing Industrial Building, 10 Cheung Yue Street 11th Floor, Cheung Sha Wan, Kowloon, Hong Kong. (10/00)

Great Southern International Limited, Flat A, 13th floor, Foo Cheong Building, 82-86 Wing Lok Street, Central, Hong Kong. (9/98)

G.T. Plus Ltd., Kowloon Centre, 29-43 Ashley Road, 4/Fl, Tsimshatsui, Kowloon, Hong Kong. (3/99)

Jiangxi Garments Import and Export Corp., Foreign Trade Building, 60 Zhangqian Road, Nanchang, China. (3/98)

Liable Trading Company, 1103 Kai Tak Commercial Building, 62-72 Stanley Street, Kowloon, Hong Kong. (9/98)

Lucky Mind Industrial Limited, Lincoln Centre, 20 Yip Fung Street, Flat 11, 5/F, Fan Ling, New Territories, Hong Kong. (10/99)

Mabco Limited, 6/F VIP Commercial Centre, 116-120 Canton Road, Kowloon, Hong Kong. (3/99)

McKowan Lowe & Company Limited, 1001-1012 Hope Sea Industrial Centre, 26 Lam Hing Street, Kowloon Bay, Kowloon, Hong Kong. (9/98)

Rex Industries Limited, VIP Commercial Center, 116-120 Canton Road, 11th Floor, Tsimshatsui, Kowloon, Hong Kong. (9/98)

Sannies Garment Factory, 35-41 Tai Lin Pai Road, Gold King Industrial Building, Flat A & B, 2nd Floor, Kwai Chung, New Territories, Hong Kong. (9/98)

Shing Fat Gloves & Rainwear, 2 Tai Lee Street, 1-2 Floor, Yuen Long, New Territories, Hong Kong. (9/98)

Sun Kong Glove Factory, 188 San Wan Road, Units 32-35, 3rd Floor, Block B, Sheung Shui, New Territories, Hong Kong. (9/98)

Takhi Corporation, Huvsgalchdyn Avenue, Ulaanbaatar 11, Mongolia. (3/98)

Any of the above parties may petition to have its name removed from the list. Such petitions, to include any documentation that the petitioner deems pertinent to the petition, should be forwarded to the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

## ADDITIONAL FOREIGN ENTITIES

In the March 30, 2000, **Federal Register** notice, Customs also solicited information regarding the whereabouts of 32 foreign entities, which were identified by name and known address, concerning alleged violations of section 592. Persons with knowledge of the whereabouts of those 32 entities were requested to contact the Assistant Commissioner, Office of Field Operations, United States Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

In this document, a new list is being published which contains the names and last known addresses of 26 entities. This reflects the removal of six entities from the list of 32 entities published on March 30, 2000.

Customs is soliciting information regarding the whereabouts of the following 26 foreign entities concerning alleged violations of section 592. Their names and last known addresses are listed below (the parenthesis following the listing sets forth the month and year in which the name of the company was first published in the **Federal Register**):

Au Mi Wedding Dresses Company, Dragon Industry Building, 98, King Law Street, Unit F, 9/F, Lai Chi Kok, Kowloon, Hong Kong. (10/99)

Balmar Export Pte. Ltd., No. 7 Kampong Kayu Road, Singapore, 1543. (3/98)

Essence Garment Making Factory, Splendid Centre, 100 Larch Street, Flat D, 5th Floor, Taikoktsui, Kowloon, Hong Kong. (3/98)

Fabrica de Artigos de Vest. Dynasty, Lda., Avenida do Almirante Magalhaes Correia, Edificio Industrial Keck Seng, Block III, 4th Floor "UV", Macau. (3/98)

Fabrica de Artigos de Vestuario Lei Kou, No. 45 Estrada Marginal de Areia Preta, Edif.Ind.Centro Polytex, 6th Floor, D, Macau. (9/98)

Fabrica de Vestuario Wing Tai, 45 Estrada Marginal Da Areia Preta, Edif. Centro Poltex, 3/E, Macau. (3/98)

Galaxy Gloves Factory, Annking Industrial Building, Wang Yip East Street Room A, 2/F, Lot 357, Yuen Long Industrial Estate, Yuen Long, New Territories, Hong Kong. (3/98)

Golden Perfect Garment Factory, Wong's Industrial Building, 33 Hung To Road, 3rd Floor, Kwun Tong, Kowloon, Hong Kong. (9/98)

Golden Wheel Garment Factory, Flat A, 10/F, Tontex Industrial Building, 2-4 Sheung Hei Street, San Po Kong, Kowloon, Hong Kong. (10/99)

Grey Rose Maldives, Phoenix Villa, Majeedee Magu, Male, Republic of Maldives. (3/98)

K & J Enterprises, Witty Commercial Building, 1A-1L Tung Choi Street, Room 1912F, Mong Kok, Kowloon, Hong Kong. (9/98)

Konivon Development Corp., Shun Tak Center, 200 Connaught Road, No. 3204, Hong Kong. (3/98)

Kwuk Yuk Garment Factory, Kwong Industrial Building, 39-41 Beech St., Flat A, 11th Floor, Tai Kok Tsui, Kowloon, Hong Kong. (3/98)

Lai Cheong Gloves Factory, Kar Wah Industrial Building, 8 Leung Yip Street, Room 101, 1-F, Yuen Long, New Territories, Hong Kong. (3/00)

Leader Glove Factory, Tai Ping Industrial Centre, 57, Ting Kok Road, 25/F, Block 1, Flat A, Tai Po, New Territories, Hong Kong. (3/98)

Maxwell Garment Factory, Unit C, 21/F, 78-84, Wang Lung Street, Tseun Wan, New Territories, Hong Kong. (3/99)

New Leo Garment Factory Ltd, Galaxy Factory Building, 25-27 Luk Hop Street, Unit B, 18th Floor, San Po Kong, Kowloon, Hong Kong. (9/98)

Penta-5 Holding (HK) Ltd., Metro Center II, 21 Lam Hing Street, Room 1907, Kowloon Bay, Kowloon, Hong Kong. (9/98)

Silver Pacific Enterprises Ltd., Shun Tak Center, 200 Connaught Road, No. 3204, Hong Kong. (3/98)

Tak Hing Textile Company Limited, Wo Fung Industrial Building, 3/F, block D, Lot No. 5180, IN D.D 51, On Lok Village, Fanling, New Territories, Hong Kong. (3/99)

Tat Hing Garment Factory, Tat Cheong Industrial Building, 3 Wing Ming Street, Block C, 13/F, Lai Chi Kok, Kowloon Hong Kong. (3/98)

Tientak Glove Factory Limited, 1 Ting Kok Road, Block A, 26/F, Tai Po, New Territories, Hong Kong. (3/98)

Wealthy Dart, Wing Ka Industrial Building, 87 Larch Street, 7th Floor, Kowloon, Hong Kong. (3/98)

Wilson Industrial Company, Yip Fat Factory Building, 77 Hoi Yuen Road, Room B, 3/F, Kwun Yong, Kowloon, Hong Kong. (3/98)

Wing Lung Manufactory, Hing Wah Industrial Building, Units 2, 5-8, 4th Floor YLTL 373, Yuen Long, New Territories, Hong Kong. (9/98)

Yogay Fashion Garment Factory Ltd, Lee Wan Industrial Building, 5 Luk Hop Street, San Po Kong, Kowloon, Hong Kong. (3/98)

If you have any information as to a correct mailing address for any of the above 26 firms, please send that information to the Assistant Commissioner, Office of Field Operations, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229.

Dated: October 12, 2000

BONNI G. TISCHLER
*Assistant Commissioner*
*Office of Field Operations*

[Published in the **Federal Register,** October 18, 2000 (65 FR 62409)]

---

## QUARTERLY IRS INTEREST RATES USED IN CALCULATING INTEREST ON OVERDUE ACCOUNTS AND REFUNDS ON CUSTOMS DUTIES

AGENCY: Customs Service, Treasury.

ACTION: General notice.

SUMMARY: This notice advises the public of the quarterly Internal Revenue Service interest rates used to calculate interest on overdue accounts (underpayments) and refunds (overpayments) of Customs duties. For the quarter beginning October 1, 2000, the interest rates for overpayments will be 8 percent for corporations and 9 percent for non-corporations, and the interest rate for underpayments will be 9 percent. This notice is published for the convenience of the importing public and Customs personnel.

EFFECTIVE DATE: October 1, 2000.

FOR FURTHER INFORMATION CONTACT: Ronald Wyman, Accounting Services Division, Accounts Receivable Group, 6026 Lakeside Boulevard, Indianapolis, Indiana 46278, (317) 298-1200, extension 1349.

## SUPPLEMENTARY INFORMATION:

### BACKGROUND

Pursuant to 19 U.S.C. 1505 and Treasury Decision 85-93, published in the **Federal Register** on May 29, 1985 (50 FR 21832), the interest rate paid on applicable overpayments or underpayments of Customs duties shall be in accordance with the Internal Revenue Code rate established under 26 U.S.C. 6621 and 6622. Section 6621 was amended (at paragraph (a)(1)(B) by the Internal Revenue Service Restructuring and Reform Act of 1998, Pub.L. 105-206, 112 Stat. 685) to provide different interest rates applicable to overpayments: one for corporations and one for non-corporations. The interest rate applicable to underpayments is not so bifurcated.

The interest rates are based on the short-term Federal rate and determined by the Internal Revenue Service (IRS) on behalf of the Secretary of the Treasury on a quarterly basis. The rates effective for a quarter are determined during the first-month period of the previous quarter.

In Revenue Ruling 2000-42 (*see*, 2000-39 IRB 297, dated September 25, 2000), the IRS determined the rates of interest for the first quarter of fiscal year (FY) 2001 (the period of October 1 - December 31, 2000). The interest rate paid to the Treasury for underpayments will be the short-term Federal rate (6%) plus three percentage points (3%) for a total of nine percent (9%). For corporate overpayments, the rate is the Federal short-term rate (6%) plus two percentage points (2%) for a total of eight percent (8%). For overpayments made by non-corporations, the rate is the Federal short-term rate (6%) plus three percentage points (3%) for a total of nine percent (9%). These interest rates are subject to change the second quarter of FY-2001 (the period of January 1 - March 31, 2001).

For the convenience of the importing public and Customs personnel the following list of IRS interest rates used, covering the period from before July of 1974 to date, to calculate interest on overdue accounts and refunds of Customs duties, is published in summary format.

| *Beginning Date* | *Ending Date* | *Under-payments* (percent) | *Over-paymets* (percent) | *Corporate Date Overpayments* (Eff. 1-1-99) (percent) |
|---|---|---|---|---|
| Prior to 070174 | 063075 | 6% | 6% | |
| 070175 | 013176 | 9 % | 9 % | |
| 020176 | 013178 | 7 % | 7 % | |
| 020178 | 013180 | 6 % | 6 % | |
| 020180 | 013182 | 12 % | 12 % | |
| 020182 | 123182 | 20 % | 20 % | |
| 010183 | 063083 | 16 % | 16 % | |
| 070183 | 123184 | 11 % | 11 % | |
| 010185 | 063085 | 13 % | 13 % | |
| 070185 | 123185 | 11 % | 11 % | |
| 010186 | 063086 | 10 % | 10 % | |
| 070186 | 123186 | 9 % | 9 % | |
| 010187 | 093087 | 9 % | 8 % | |
| 100187 | 123187 | 10 % | 9 % | |
| 010188 | 033188 | 11 % | 10 % | |
| 040188 | 093088 | 10 % | 9 % | |
| 100188 | 033189 | 11 % | 10 % | |
| 040189 | 093089 | 12 % | 11 % | |
| 100189 | 033191 | 11 % | 10 % | |
| 040191 | 123191 | 10 % | 9 % | |
| 010192 | 033192 | 9 % | 8 % | |
| 040192 | 093092 | 8 % | 7 % | |
| 100192 | 063094 | 7 % | 6 % | |
| 070194 | 093094 | 8 % | 7 % | |
| 100194 | 033195 | 9 % | 8 % | |
| 040195 | 063095 | 10 % | 9 % | |
| 070195 | 033196 | 9 % | 8 % | |
| 040196 | 063096 | 8 % | 7 % | |
| 070196 | 033198 | 9 % | 8 % | |
| 040198 | 123198 | 8% | 7% | |
| 010199 | 033199 | 7% | 7% | 6% |
| 040199 | 033100 | 8% | 8% | 7% |
| 040100 | 123100 | 9% | 9% | 8% |

Dated: October 15, 2000

RAYMOND W. KELLY
*Commissioner of Customs*

[Published in the **Federal Register,** October 23, 2000 (65 FR 63288)]

# U.S. Customs Service

October 18, 2000
Department of the Treasury
Office of the Commissioner of Customs
Washington, D.C.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs field offices to merit publication in the Customs Bulletin.

STUART P. SEIDEL
*Assistant Commissioner*
*Office of Regulations and Rulings*

# U.S. Customs Service

## *General Notice*

### PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF INTERCHANGEABLE TOOLS FOR HANDTOOLS

19 CFR PART 177

AGENCY: U.S. Customs Service, Department of the Treasury

ACTION: Notice of proposed revocation of ruling letter, and treatment relating to tariff classification of interchangeable tools for handtools.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of interchangeable tools for handtools under the Harmonized Tariff Schedule of the United States ("HTSUS"). Customs also intends to revoke any treatment previously accorded by Customs to substantially identical transactions. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before December 1, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, General Classification Branch, (202) 927-2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended,

and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of interchangeable tools for handtools. Although in this notice Customs is specifically referring to one ruling, NY E85716, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final notice of this proposed action.

In NY E85716 dated August 23, 1999, set forth as Attachment A to this document, Customs classified interchangeable tools for handtools under subheading 8207.90.75, HTSUS. It is now Customs position that the interchangeable tools for handtools are classified under subheading 8207.90.60, HTSUS.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY

E85716 and any other ruling not specifically identified in order to reflect the proper classification of the merchandise pursuant to the analysis set forth in proposed HQ 964142. See Attachment B to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Dated: October 12, 2000

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[Attachments]

---

[ATTACHMENT A]

*August 23, 1999*
CLA-2-82:RR:NC:1:115 E85716
Category: Classification
Tariff No.: 8207.90.7585

MR. JONATHAN P. BECK
TOWER GROUP INTERNATIONAL
*1099 Winterson Road*
*Building 19, Suite 105*
*Linthicum, MD 21090-2225*

Re: The tariff classification of Power Tool Accessories from various countries not listed at this time.

DEAR MR. BECK:

In your letter dated July 7, 1999 you requested a tariff classification ruling on behalf of your client Black & Decker Corporation.

The sample submitted is a plastic molded case holding the following items: Bit Holders, Drill Bits, Screwdriver Bits, Sockets, Nut Driver and Steel Ruler.

Two other sets were also listed in your inquiry. Both sets are in plastic molded cases. One set has the following items: Drill Bits, Screws & Counter Sinks, Bit Holder, Screwdriver Bits and Screw Extractor. The second set has the following items: Nut Driver, Bit Holder, Screwdriver Bits and Drill Bits.

The applicable subheading for the Power Tool Accessories in Plastic Cases will be 8207.90.7585, Harmonized Tariff Schedule of the United States (HTS), which provides for Interchangeable tools for handtools, whether or not power-operated, or for machine-tools; base metal parts thereof: Other interchangeable tools. and parts thereof. Other. The rate of duty will be 3.7% ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Melvyn Birnbaum at 212-637-7017.

ROBERT B. SWIERUPSKI
*Director,*
*National Commodity*
*Specialist Division*

---

[ATTACHMENT B]

CLA-2 RR:CR:GC 964142 GOB
Category: Classification
Tariff No.: 8207.90.60

JONATHAN P. BECK
TOWER GROUP INTERNATIONAL
*1099 Winterson Road*
*Building 19, Suite 105*
*Linthicum, MD 21090-2225*

Re: Interchangeable tools for handtools; NY E85716 revoked

DEAR MR. BECK:

This is with respect to New York Ruling Letter ("NY") E85716, issued to you on behalf of Black & Decker Corporation by the Customs National Commodity Specialist Division, New York, on August 23, 1999. In that ruling, three sets of interchangeable tools for power handtools were classified in subheading 8207.90.75, Harmonized Tariff Schedule of the United States ("HTSUS"). We have reviewed that classification and have determined that it is incorrect. This ruling sets forth the correct classification.

*Facts:*

All three sets of power tool accessories are in plastic molded cases. The first set of tools includes the following: magnetic bit holder, drill bits, screwdriver bits, sockets, nut driver, and ruler. The second set includes: drill bits, screws and countersinks, magnetic bit holder, screwdriver bits, and screw extractor. The third set includes: nut driver, magnetic bit holder, screwdriver bits, and drill bits. All three sets of tools may be collectively referred to herein as "the goods."

*Issue:*

What is the correct tariff classification of the above described goods?

*Law and Analysis:*

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

GRI 3 provides as follows:

> When, by application of rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Explanatory Note (X) to GRI 3(b) provides that:

> ... the term "goods put up in sets for retail sale" shall be taken to mean goods which:
>
> (a) consist of at least two different articles which are, prima facie, classifiable in different headings ...;
>
> (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
>
> (c) are put up in a manner suitable for sale directly to users without repacking ...

We find that the goods cannot be classified at GRI 1 because they are *prima facie* classifiable under more than one heading. For example, the following are the HTSUS headings that the items within the sets would be provided for in. The first set: magnetic bit holder – 8466; drill bits – 8207; screwdriver bits – 8207; sockets – 8204; nut driver – 8204; and ruler – 9017. The second set: drill bits – 8207; screws and countersinks – 7318; magnetic bit holder – 8466; screwdriver bits – 8207; and screw extractor – 8207. The third set: nut driver – 8204; magnetic bit holder – 8466; screwdriver bits – 8207; and drill bits – 8207.

We find that GRI 3(a) is relevant here in that two or more headings each refer to part only of the items in a set put up for retail sale. Pursuant to GRI 3(a) in that situation, those headings are to be regarded as equally specific in relation to those goods.

We then turn to GRI 3(b) and an evaluation of which item gives each set its essential character. With respect to each of the three sets, we find that there is no one item which gives the set its essential character. For example, there is no evidence or documentation to the effect that any one item within each set has a value substantially higher than the other items. Also, there is no indication that any one item within each set performs a function that is much more critical or indispensable than the other items within each set.

Therefore, we look to GRI 3(c) to classify the goods "under the heading which occurs last in numerical order among those which equally merit consideration."

With respect to each of the sets, we find that there are items which are of lesser importance than the other items in the same set (i.e., they perform functions

which are less important than the functions performed by the other items) and thus do not merit equal consideration with respect to the GRI 3(c) determination. The items which do not merit equal consideration in the context of GRI 3(c) are: first set – magnetic bit holder and ruler; second set – magnetic bit holder, screws and countersinks; and third set – magnetic bit holder. With respect to the magnetic bit holders, we note that they are not in continual use. They are designed to hold hex shank tools and the drill bits for all three sets have round shanks, i.e., in each set, the magnetic bit holders cannot be used with the drill bits.

The items within each set which merit equal consideration with respect to GRI 3(c) are as follows: first set – drill bits, screwdriver bits, sockets, and nut driver; second set – drill bits, screwdriver bits, and screw extractor; and third set – nut driver, screwdriver bits, and drill bits.

Accordingly, in choosing the last subheading in numerical order among those meriting equal consideration, we find that the goods are classified as follows. Each of the three sets is classified in subheading 8207.90.60, HTSUS, as: "Interchangeable tools for handtools, whether or not power-operated ... : Other interchangeable tools, and parts thereof: ... Other: ... Other: ... Not suitable for cutting metal, and parts thereof: For handtools, and parts thereof."

*Holding:*

Each of the three sets is classified in subheading 8207.90.60, HTSUS, as: "Interchangeable tools for handtools, whether or not power-operated ... : Other interchangeable tools, and parts thereof: ... Other: ... Other: ... Not suitable for cutting metal, and parts thereof: For handtools, and parts thereof."

*Effect on Other Rulings:*

NY E85716 is revoked.

JOHN DURANT,
*Director,*
*Commercial Rulings Division*

c.c: National Commodity Specialist Division
NIS Robert Losche

---

## PROPOSED MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF FIXED KEYS AND SHAFT KEYS

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letters and revocation of treatment relating to tariff classification of fixed keys and shaft keys.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify two rulings relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of fixed keys and shaft keys, and to revoke any treat-

ment Customs has previously accorded to substantially identical transactions. These articles are integral parts of compressors for motor vehicles and air conditioning machines. Customs invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before December 1, 2000.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Submitted comments may be inspected at the same location during regular business hours.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are informed compliance and shared responsibility. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to modify two rulings relating to the tariff classification of fixed keys and shaft keys. Although in this notice Customs is specifically referring to two rulings, *NY* D82828 and *NY* 82829, both dated October 30, 1998, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the ones identified. No further rulings have been identified. Any party who has received an

interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should advise Customs during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to this notice.

In *NY* D82828, dated October 30, 1998, a fixed key, part # 7800-0320, among other articles, was held to be classifiable in subheading 8414.90.40, HTSUS, as other parts of compressors. This ruling was based on the article's function which was to hold a gear in place within the cylinder block of a compressor. *NY* D82828 is set forth as "Attachment A" to this document. *NY* D82829, dated October 30, 1998, among other things, classified an accessory kit, part # 4605-9800, for installing or repairing a clutch assembly in the same provision. The accessory kit contained snap rings, shims, fasteners, wire and a shaft key, all of which were said to be imported and sold together in retail packaging. *NY* D82829 determined that the shaft key, which ensured the transmission of torque from the clutch assembly to the compressor's piston assembly, imparted the essential character to the accessory kit. *NY* D82829 is set forth as "Attachment B" to this document.

It is now Customs position that fixed keys and shaft keys function to secure gears, pulleys, cranks, handles, wheels and couplings to rotating shafts so that the motion of these parts is transmitted to the shaft, or vice versa, without slippage. These articles perform a locking or fastening function similar to so-called Woodruff keys, which are classifiable in subheading 7318.24.00, HTSUS, as cotters . Pursuant to 19 U.S.C. 1625(c)(1)), Customs intends to modify *NY* D82828 and *NY* D82829, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis in *HQ* 963816, which is set forth as "Attachment C" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

Date: October 17, 2000

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[Attachments]

---

[ATTACHMENT A]

*October 30, 1998*
CLA-2-84:RR:NC:1:102 D82828
Category: Classification
Tariff No.: 8414.90.4040, 5911.90.0080

MR. DANA L. TROUT
TRANS-TRADE, INC.
*P.O. Box 612369*
*DFW Airport 75261*

Re: The tariff classification of parts of compressors from Japan

DEAR MR. TROUT:

In your letter dated September 21, 1998 you requested a tariff classification ruling on behalf of Sanden International (USA).

The items in question are a bearing dust cover, part number 8477-1070, felt rings, part numbers 9374-1010 and 9374-1020, a fixed key, part number 7800-0320, and a shaft rotor assembly, part number 7553-6040. Samples and technical drawings were submitted.

The bearing dust cover is a steel part used on a air conditioning compressor to prevent dust from accumulating on the compressor's bearings. Part 9374-1010 is simply a felt ring, while part 9374-1020 is a felt ring to which a rubber ring seal is bonded. Both rings are also used to seal the internal components of a compressor from dust. The fixed key is a small rectangular key used to hold a gear in place within a compressor's cylinder block. The shaft rotor assembly is a mechanical component used to connect the rotor and pistons within a compressor.

The applicable subheading for the bearing dust cover, fixed key and shaft rotor assembly will be 8414.90.4040, Harmonized Tariff Schedule of the United States (HTSUS), which provides for other parts of refrigerating and air conditioning compressors. The rate of duty will be 0.7 percent ad valorem.

The applicable subheading for the felt rings will be 5911.90.0080, HTSUS, which provides for other textile products and articles, for technical uses. The rate of duty will be 6 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth T. Brock at 212-466-5493.

ROBERT B. SWIERUPSKI
*Director,*
*National Commodity*
*Specialist Division*

[ATTACHMENT B]

*October 30, 1998*
CLA-2-84:RR:NC:1:102 D82829
Category: Classification
Tariff No.: 8484.20.0000, 8484.20.0000, 8483.90.5000, 8505.20.0000

MR. DANA L. TROUT
TRANS-TRADE, INC.
*P.O. Box 612369*
*DFW Airport, TX 75261*

Re: The tariff classification of compressor parts from Japan

DEAR MR. TROUT:

In your letter dated September 18, 1998 you requested a tariff classification ruling on behalf of Sanden International (USA).

The articles in question are a cylinder head with gasket, part 7433-9630, a lip seal, part 7703-6150, a clutch assembly with accessory kit, part 4605-9930, an accessory kit, part 4605-9800, and an O-gear, part 7905-0290. Samples and technical drawings were submitted.

The cylinder head and gasket are parts of an air conditioning compressor which attach to the compressor's cylinder block. The head and gasket are imported and sold together in retail packaging. The lip seal is a mechanical seal used to contain gases within the compressor. The O-gear is an oscillating gear which is part of a compressor's internal gearing.

The clutch assembly with accessory kit is a magnetic clutch assembly with all the parts necessary to mount the clutch assembly within the compressor. The accessory kit contains the mounting components, which include snap rings, shims, fasteners, wire and a shaft key.

The accessory kit included with the clutch assembly may be purchased separately as a repair kit when a complete clutch assembly is not needed. The parts contained in the accessory kit are imported and sold together in retail packaging. We find that the shaft key, which ensures the transmission of torque from the clutch assembly to the compressor's piston assembly, gives the accessory kit its essential character.

The applicable subheading for the lip seal will be 8484.20.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for mechanical seals. The rate of duty will be 4.3 percent ad valorem.

The applicable subheading for the clutch assembly with accessory kit, when presented together, will be 8505.20.0000, HTSUS, which provides for electromagnetic couplings, clutches and brakes. The rate of duty will be 3.3 percent ad valorem.

The applicable subheading for the O-gear, will be 8483.90.5000, HTSUS, which provides for parts of gearing, gear boxes and other speed changers. The rate of duty will be 2.5 percent ad valorem.

The applicable subheading for the cylinder head with gasket and the accessory kit, when presented separately, will be 8414.90.4040, HTSUS, which provides for other parts of refrigerating and air conditioning compressors. The rate of duty will be 0.7 percent ad valorem.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 CFR 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth T. Brock at 212-466-5493.

ROBERT B. SWIERUPSKI
*Director,*
*National Commodity*
*Specialist Division*

[ATTACHMENT C]

CLA-2 RR:CR:GC 963816 JAS
Category: Classification
Tariff No.: 7318.24.00

MS. JANIE HERRERS
SANDEN INTERNATIONAL (U.S.A.), INC.
*601 South Sanden Blvd.*
*Wylie, TX 75098-4999*

Re: *NY* D82828, *NY* 82829 Modified; Fixed Key, Shaft Key for Compressors

DEAR MS. HERRERS:

In a letter, dated January 17, 2000, you request reconsideration of *NY* E89997, which the Director of Customs National Commodity Specialist Division, New York, issued to you on December 10, 1999. This ruling classified a fixed key in subheading 7318.24.00, Harmonized Tariff Schedule of the United States (HTSUS), as cotters and cotter pins.

You maintain that *NY* E89997 is inconsistent with *NY* D82828 and *NY* D82829. Both rulings were issued on October 30, 1998, to Sanden's Customs broker, and classified fixed keys and shaft keys, respectively, in subheading 8414.90.40, HTSUS, as other parts of compressors. We have reconsidered the classification expressed in *NY* D82828 and *NY* D82829 and now believe that it is incorrect.

*Facts:*

*NY* D82828 in part concerned a fixed key, identified as part # 7800-0320, and described as a small rectangular key used to hold a gear in place within the cylinder block of a compressor. *NY* D82829 in part concerned a clutch repair kit imported and packaged for retail sale, part # 4605-9800, in which a shaft key was held to impart the essential character.

The ruling request that resulted in *NY* D89997 described the fixed key as a square-shaped article of steel, 1 3/8 inch long, and identified it as part # 7801-0320. A submitted sample confirms this description. The article was said to fit into the groove of a fixed gear to hold the gear in place inside the cylinder block of a compressor. A sample of the shaft key which you submitted is 5/16 inch long. It is oval-shaped on one side and straight on the other side.

You maintain that the fixed key, as described in *NY* D82828, is rectangular and not wedge-shaped, and belongs to the same family of articles used with compressors to fix gears so that they only move up and down and lock armature plates in position with the shaft. You state that the shape and function of shaft keys and fixed keys is the basis for the claim that they are compressor parts.

The HTSUS provisions under consideration are as follows:

| | | |
|---|---|---|
| 7318 | ...cotters, cotter pins, washers...and similar articles, of iron or steel | |
| | Threaded articles: | |
| | Non-threaded articles: | |
| 7318.24.00 | | Cotters and cotter pins |
| * | * | * * |
| 8414 | ...air or gas compressors and fans...; parts thereof: | |
| 8414.90 | | Parts: |

| | |
|---|---|
| | Of compressors: |
| 8414.90.40 | Other |

*Issue:*

Whether fixed keys and shaft keys used with air conditioning compressors are fasteners of heading 7318.

*Law and Analysis:*

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

Section XVI, Note 1(g), HTSUS, excludes from Chapter 84 so-called parts of general use. Throughout the tariff schedule, the expression "*parts of general use*," as defined in Section XV, Note 2(a), includes articles of heading 7318. Therefore, if the fixed keys and shaft keys at issue here are goods of heading 7318, they cannot be classified in subheading 8414.90.40.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the HTSUS. Though not dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS. Customs believes the ENs should always be consulted. See T.D. 89-80. 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

The ENs to heading 7318 describe Cotter-pins on p. 1117 as used for fitting in holes in spindles, shafts, bolts, etc., to prevent objects mounted thereon from moving along them. On p. 1118 the ENs describe Cotters and taper pins as used for similar purposes but they are usually larger and more solid; they may be designed like cotter-pins, to pass through holes (in which case they are often wedge-shaped), or for *fitting into grooves or slots cut [a]round the shaft, spindle, etc.*, in which case they may be of various shapes such as horseshoe or conical. (Underlining added).

In the absence of a contrary legislative intent, tariff terms that are not defined in a HTSUS section or chapter note, or clearly described in an EN, are construed in accordance with their common and commercial meanings, which are presumed to be the same. Dictionaries, scientific authorities and other reliable lexicographic sources are often consulted; and, where the term under consideration is technical in nature, appropriate technical sources of information should be consulted. In this case, a typical definition of the term cotter is "a pin, wedge, key or the like, fitted or driven into an opening to secure something or hold parts together." *See Random House Unabridged Dictionary*, Second Edition, p. 459 (1983). In addition, the *IPT Industrial Fasteners Training Manual*, Bolting and Securing Systems, published in 1989 by *Industrial Publishing and Training, Ltd.*, Alberta, Canada, on pp. 346 and 352 includes under the general heading "Non-Threaded Fasteners" the following discussion under Keys:

> Keys are specially cut and shaped pieces of metal inserted and assembled into keysets to provide a positive means of transmitting torque between the shaft and hub. The keyseat is an accurately cut *groove* located axially in the shaft. The key *secures* gears, pulleys, cranks, handles, wheels and couplings to shafts so that the motion of the part is transmitted to the shaft, or vice versa, without slippage. (Underlining added). A Woodruff key is semicircular in shape and fits into a semi-circular keyseat in the shaft and a rectangular keyway in the hub.

The fixed keys and shaft keys at issue are within the referenced EN description, as well as the definitions in the cited lexicons. They also conform to the description of and function ascribed to these articles in your letter of January 17, 2000. In our opinion, the fixed keys and shaft keys are non-threaded fasteners that are within the common and commercial meaning of the term *cotter* for tariff purposes. They

are provided for in heading 7318. Because goods of heading 7318 are "*parts of general use*," as defined in Section XV, Note 2(a), Section XVI, Note 1(g) prevents them from being classified in heading 8414. This classification is consistent with Customs position on similar merchandise. See NY B87322, dated July 25, 1997, which classified steel retaining rings called snap rings, used to secure components within forklift truck transmissions, in subheading 7318.24.00, HTSUS.

*Holding:*

Under the authority of GRI 1, the fixed keys represented by part # 7800-0320, and the clutch repair kits packaged for retail sale, represented by part # 4605-9800, in which the shaft key imparts the essential character, are provided for in heading 7318. They are classifiable in subheading 7318.24.00, HTSUS. NY D82828 and NY D82829, both dated October 30, 1998, are modified as to this merchandise.

JOHN DURANT,
*Director,*
*Commercial Rulings Division*

---

## REVOCATION AND MODIFICATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO CLASSIFICATION OF CERTAIN SHAMPOOS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation and modification of classification ruling letters and revocation of treatment relating to the classification of certain shampoo products.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-1 82, 107 Stat. 2057), this notice advises interested parties that Customs is revoking or modifying ruling letters pertaining to the tariff classification of certain shampoo products and revoking any treatment previously accorded by the Customs Service to substantially identical transactions. Notice of the proposed modifications and revocations was published in the *Customs Bulletin* of September 13, 2000, Vol. 34, No. 37. No comments were received.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 2, 2001.

FOR FURTHER INFORMATION CONTACT: Peter T. Lynch, General Classification Branch, 202-927-1396.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8,1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. §1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37, proposing to modify or revoke NY 863843, 863846, 805283 and B83221, pertaining to the tariff classification of certain shampoo products. No comments were received in reply to the notice.

In NY 863843, dated July 2, 1991, the classification of a product commonly referred to as Welandol Antiseptic Shampoo was determined to be in subheading 3004.90.6003, HTSUS, which provides for medicaments for other veterinary use packaged for retail sale.

In NY 863846, dated July 5, 1991, the classification of a product commonly referred to as K.F.L. Insecticide Shampoo was determined to be classified in subheading 3808.10.2000, HTSUS, which provides for other aromatic insecticide preparations.

In NY 805283, dated February 23, 1995, the classification of a product commonly referred to as "KOPIX" was determined to be classified in subheading 3003.90.0000, HTSUS, which provides for medicaments, .. consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms of packings for retail sale, other.

In NY B83221, dated March 31, 1997, the classification of a product commonly referred to as "Nizoral® (ketoconazole) 2% shampoo" was determined to be classified in subheading 3004.90.9010, HTSUS, which provides for medicaments ... put up in measured doses or in forms or packings for retail sale; other.

Since the issuance of these rulings, Customs has had a chance to review the classifications of the merchandise in the rulings and has

determined that the classifications are in error. The correct classification of Nizoral® (ketoconazole) 2% shampoo is subheading 3305.10, HTSUS, which provides for preparations for use on the hair; shampoos. The correct classification of Welandol Antiseptic Shampoo and K.F.L. Shampoo is subheading 3307.90.0000, HTSUS, which provides for cosmetic or toilet preparations, not elsewhere specified or included. The correct classification of "KOPIX" is subheading 3824.90.2800, HTSUS, which provides for mixtures containing 5 percent or more by weight of one or more aromatic or modified aromatic substances; other.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY B83221 and 805283 and modifying NY 863846 and 863843, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters (HQ) 963705, 963706, 963707 and 963708 (see "Attachments A through D" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

As stated in the proposal notice, these modifications and revocations will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should have advised the Customs Service during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this notice.

In accordance with 19 U.S.C. 1625(c), the rulings will become effective 60 days after publication in the *Customs Bulletin*.

Dated: October 17, 2000

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[Attachments]

---

[ATTACHMENT A]

*October 17, 2000*
CLA-2 RR:CR:GC 963705ptl
Category: Classification
Tariff No.: 3307.90.0000

MR. JEROME SCHRAUB
MI-TU INSTRUCTIONAL SERVICES INC.
*P.O. Box 346*
*Alden Manor Branch*
*Floral Park, NY 110037*

Re.: K.F.L. Insecticidal Shampoo; NY 863846 modified.

DEAR MR. SCHRAUB:

In NY 863846, issued July 5, 1991, to you on behalf of your client, Pitman-Moore, by the Director, Customs National Commodity Specialist Division, New York, among the articles classified under the Harmonized Tariff Schedule of the United States (HTSUS), was a product identified as K.F.L. Insecticidal Shampoo (K.F.L.). K.F.L. was classified, in subheading 3808.10.2000, HTSUS, which provides for other aromatic insecticide preparations. We have reconsidered that ruling and determined that the classification of K.F.L. was incorrect. The correct classification of K.F.L. is in subheading 3307.90.0000, HTSUS, pursuant to the analysis set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of NY 863846 was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37. No comments were received.

*Facts:*

The product identified as K.F.L., contains synergized pyrethrins and is used as an insecticide shampoo for fast, effective results against fleas and ticks on domestic animals.

*Issue:*

What is the classification of K.F.L. Insecticidal Shampoo?

*Law and Analysis:*

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127,

35128 (August 23, 1989).

The 2000 HTSUS headings under consideration are as follows:

3307 Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties:

* * *

3307.90.0000 Other

3808 Insecticides, rodenticides, fungicides, herbicides, antisprouting products and plant-growth regulators, disinfectants and similar products, put up in forms or packings for retail sale or as preparations or articles (for example, sulfur-treated bands, wicks and candles, and flypapers):

3808.10 Insecticides:

* * *

Other:

Containing any aromatic or modified aromatic insecticide:

* * *

3808.10.2500 Other

In its 23rd Session, held in May 1999, the Harmonized System Committee (HSC) decided, pursuant to GRI 1, that certain "special" (medicinal) shampoos were properly classified in subheading 3305.10, HTS, which provides for shampoos. (see Annex IJ/2 to HSC Document NC0090E1, May 1999).

Heading 3305, HTSUS, covers preparations for use on the hair and subheading 3305.10.000, HTSUS, covers shampoos. The ENs to heading 33.05 state that:

> "This heading covers:
>
> (1) Shampoos, containing soap or other organic surface-active agents (see Note 1 (c) to Chapter 34 [which excludes such products from coverage in that Chapter]), and other shampoos. All these shampoos may contain subsidiary pharmaceutical or disinfectant constituents, even if they have therapeutic or prophylactic properties (see Note 1(d) to Chapter 30 [discussed above]).

The ENs make it clear that all products which are presented as shampoos, whether or not they contain any "special" or subsidiary constituents, are to be classified in subheading 3305.10 which specifically covers shampoos.

The K.F.L. being classified is also a shampoo, however, it is one intended for animal rather than human use. Heading 3307 covers cosmetic and toilet preparations, not elsewhere specified or included. A consistent application of the principle that shampoos should be classified as shampoos even if they contain special or subsidiary constituents, such as, in this case, insecticides, requires us to classify K.F.L. in heading 3307, HTSUS. This classification is reinforced by the ENs to heading 33.07 which state: "This heading covers: ... (V) Other products, such as, ... (6) Animal toilet preparations, such as dog shampoos, and plumage-improving washes for birds."

*Holding*:

K.F.L. insecticide shampoo is classified in subheading 3307.90.0000, HTSUS, which provides for Pre-shave, shaving or after-shave preparations, personal de-

odorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties: Other.

NY 863846, dated July 2, 1991, is modified in accordance with this ruling. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

---

[ATTACHMENT B]

*October 17, 2000*
CLA-2 RR:CR:GC 963706ptl
Category: Classification
Tariff No.: 3307.90.0000

MR. JEROME SCHRAUB
MI-TU INSTRUCTIONAL SERVICES INC.
*P.O. Box 346*
*Alden Manor Branch*
*Floral Park, NY 110037*

Re.: Tariff Classification of Weladol Antiseptic Shampoo; NY 863843 modified.

DEAR MR. SCHRAUB:

In NY 863843, issued July 2, 1991, to you on behalf of your client, Pitman-Moore, the Director, Customs National Commodity Specialist Division, New York, among several products classified under the Harmonized Tariff Schedule of the United States (HTSUS), one, identified as Weladol Antiseptic Shampoo, was classified in subheading 3004.90.6003, HTSUS, which provides for medicaments for other veterinary use packaged for retail sale. We have reconsidered that ruling and determined that the classification of Weladol Antiseptic Shampoo is incorrect. The correct classification of Weladol Antiseptic Shampoo is in subheading 3307.90.0000, HTSUS, pursuant to the analysis set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed modification of NY 863843 was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37. No comments were received.

*Facts:*

Weladol Antiseptic Shampoo is said to contain 1% iodine and is used to produce a shiny coat on domestic animals.

*Issue:*

What is the classification of Weladol Antiseptic Shampoo?

*Law and Analysis:*

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff

schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied in order.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The 2000 HTSUS headings under consideration are as follows:

3004 Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale:

* * *

3004.90 Other:

* * *

3004.90.90 Other

3004.90.9003 For veterinary use

3307 Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties:

* * *

3307.90.0000 Other

NY 863848 classified Weladol Antiseptic Shampoo in heading 3004, HTSUS. That heading is contained in Chapter 30. When we refer to the Chapter Notes to Chapter 30, we see that they provide:

1. This chapter does not cover:

* * *

(d)Preparations of headings 3303 to 3307, even if they have therapeutic or prophylactic properties.

Therefore, we must determine whether Weladol Antiseptic Shampoo is a preparation of headings 3303 to 3307. If it is, the product cannot be classified in heading 3004, HTSUS.

Chapter Note 3 to Chapter 33 states:

"(3) Headings 3303 to 3307 apply *inter alia*, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use."

In its 23rd Session, held in May 1999, the Harmonized System Committee (HSC) decided, pursuant to GRI 1, that certain "special" (medicinal) shampoos were properly classified in subheading 3305.10, HTS, which provides for shampoos. (see Annex IJ/2 to HSC Document NC0090E1, May 1999).

Heading 3305, HTSUS, covers preparations for use on the hair and subheading 3305.10.000, HTSUS, covers shampoos. The ENs to heading 33.05 state that:

> "This heading covers:
> (1) Shampoos, containing soap or other organic surface-active agents (see Note 1 (c) to Chapter 34 [which excludes such products from coverage in that Chapter]), and other shampoos. All these shampoos may contain subsidiary pharmaceutical or disinfectant constituents, even if they have therapeutic or prophylactic properties (see Note 1(d) to Chapter 30 [discussed above]).

The ENs make it clear that all products which are presented as shampoos, whether or not they contain any "special" or subsidiary constituents, are to be classified in subheading 3305.10 which specifically covers shampoos.

The Weladol Antiseptic Shampoo being classified is also a shampoo, however, it is one intended for animal rather than human use. Heading 3307 covers cosmetic and toilet preparations, not elsewhere specified or included. A consistent application of the principle that shampoos should be classified as shampoos even if they contain special or subsidiary constituents, such as, in this case, iodine, requires us to classify Weladol Antiseptic Shampoo in heading 3307. This classification is reinforced by the ENs to heading 33.07 which state: "This heading covers: ... (V) Other products, such as, ... (6) Animal toilet preparations, such as dog shampoos, and plumage-improving washes for birds."

*Holding:*

Weladol Antiseptic Shampoo insecticide shampoo is classified in subheading 3307.90.0000, HTSUS, which provides for Pre-shave, shaving or after-shave preparations, personal deodorants, bath preparations, depilatories and other perfumery, cosmetic or toilet preparations, not elsewhere specified or included; prepared room deodorizers, whether or not perfumed or having disinfectant properties: Other.

NY 863843, dated July 2, 1991, is modified in accordance with this ruling. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

---

[ATTACHMENT C]

*October 17, 2000*
CLA-2 RR:CR:GC 963707ptl
Category: Classification
Tariff No.: 3305.10.0000

ROBERT J. LEO, ESQ.
MEEKS & SHEPPARD
*330 Madison Avenue, 39th Floor*
*New York, NY 11003*

Re.: Nizoral® (ketoconazole) 2% Shampoo; NY B83221 revoked.

DEAR MR. LEO:

In NY B83221, dated March 31, 1997, issued to you on behalf of Janssen

Pharmaceutica, Inc., by the Director, Customs National Commodity Specialist Division, New York, a product, identified as Nizoral® (ketoconazole) 2% Shampoo was classified under the Harmonized Tariff Schedule of the United States (HTSUS), in subheading 3004.90.9010, HTSUS, which provides for medicaments ... put up in measured doses or in forms or packings for retail sale; other. We have reconsidered that ruling and determined that the classification was incorrect. The correct classification for the product is in subheading 3305.10.0000, HTSUS, pursuant to the analysis set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY B83221 was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37. No comments were received.

*Facts:*

The product, identified as "Nizoral® (ketoconazole) 2% Shampoo" in NY B83221, is a shampoo. Ketoconazole is an antifungal drug which, when added to shampoo, is said to reduce scaling due to dandruff.

*Issue:*

What is the classification of Nizoral® (ketoconazole) 2% Shampoo?

*Law and Analysis:*

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

3004 Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of mixed or unmixed products for therapeutic or prophylactic uses, put up in measured doses or in forms or packings for retail sale:

* * *

3004.90 Other:

* * *

3004.90.9000 Other

* * *

Other

* * *

3004.90.9010 Other.

3305 Preparations for use on the hair:

3305.10.0000 Shampoos

NY B823221 classified the "Nizoral® (ketoconazole) 2% Shampoo" in heading 3004, HTSUS. That heading is contained in Chapter 30. When we refer to the Chapter Notes to Chapter 30, we see that they provide:

1. This chapter does not cover:

* * *

(d) Preparations of headings 3303 to 3307, even if they have therapeutic or prophylactic properties.

Therefore, we must determine whether "Nizoral® (ketoconazole) 2% Shampoo" is a preparation of headings 3303 to 3307. If it is, the product cannot be classified in heading 3004, HTSUS.

Chapter Note 3 to Chapter 33 states:

"(3) Headings 3303 to 3307 apply *inter alia*, to products, whether or not mixed (other than aqueous distillates and aqueous solutions of essential oils), suitable for use as goods of these headings and put up in packings of a kind sold by retail for such use."

Heading 3305, HTSUS, covers preparations for use on the hair and subheading 3305.10.000, HTSUS, covers shampoos. The ENs to heading 33.05 state that:

"This heading covers:

(1) Shampoos, containing soap or other organic surface-active agents (see Note 1 (c) to Chapter 34 [which excludes such products from coverage in that Chapter]), and other shampoos. All these shampoos may contain subsidiary pharmaceutical or disinfectant constituents, even if they have therapeutic or prophylactic properties (see Note 1(d) to Chapter 30 [discussed above]).

The ENs make it clear that all products which are presented as shampoos, whether or not they contain any "special" or subsidiary constituents, are to be classified in subheading 3305.10 which specifically covers shampoos.

Nizoral® (ketoconazole) 2% Shampoo clearly falls within the description of products contemplated by the ENs of heading 3305. It also falls within the scope of the relevant chapter notes. Accordingly, pursuant to GRI 1, Note 1(d) to Chapter 30 and Note 3 to Chapter 33, Nizoral® (ketoconazole) 2% Shampoo is classified in subheading 3305.10.0000, HTSUS. This classification is consistent with a May 1999 decision of the Harmonized System Committee which decided to classify "Nizoral" shampoo in heading 33.05 (Annex IJ/2 to HSC Document NC0090E1, May 1999).

*Holding:*

Nizoral® (ketoconazole) 2% Shampoo, is classified in subheading 3305.10.0000, HTSUS, which provides for [p]reparations for use on the hair: [s]hampoos.

NY B83221, issued March 31, 1997, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[ATTACHMENT D]

*October 17, 2000*
CLA-2 RR:CR:GC 963708ptl
Category: Classification
Tariff No.: 3824.90.2800

MS. JOAN M. STIEFEL
STIEFEL LABORATORIES, INC.
*P.O. Box 10855*
*Rockville, MD 20849-0855*

Re.: "KOPIX"; NY 805283 revoked.

DEAR MS. STIEFEL:

In NY 805283, issued to you on February 23, 1995, by the Director, Customs National Commodity Specialist Division, New York, a product identified as "KOPIX", which would be imported in bulk form, was classified under the Harmonized Tariff Schedule of the United States (HTSUS), in subheading 3003.90.0000, HTSUS, which provides for Medicaments ... consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale: other. We have reconsidered that ruling and determined that the classification was incorrect. The correct classification for the articles is in subheading 3824.90.2800, HTSUS, pursuant to the analysis set forth below.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY 805283 was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37.

No comments were received.

*Facts:*

The merchandise identified as "KOPIX" in NY 805283, is a proprietary mixture of a peanut oil extract and a crude coal tar extract. The oily yellowish brown liquid is to be imported in bulk and will be used as a raw material in the manufacture of a shampoo for dry scalp.

*Issue:*

What is the classification of the product "KOPIX"?

*Law and Analysis:*

Merchandise is classifiable under the Harmonized Tariff Schedule of the United States (HTSUS) in accordance with the General Rules of Interpretation (GRIs). The systematic detail of the HTSUS is such that virtually all goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs may then be applied.

In understanding the language of the HTSUS, the Harmonized Commodity Description and Coding System Explanatory Notes may be utilized. The Explanatory Notes (ENs), although not dispositive or legally binding, provide a commentary on the scope of each heading of the HTSUS, and are generally indicative of the proper interpretation of these headings. *See* T.D. 89-80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The HTSUS headings under consideration are as follows:

3003 Medicaments (excluding goods of heading 3002, 3005 or 3006) consisting of two or more constituents which have been mixed together for therapeutic or prophylactic uses, not put up in measured doses or in forms or packings for retail sale:

* * *

3003.90.0000 Other

3824 Prepared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included:

* * *

3824.90 Other

* * *

Other

* * *

3824.90.2800 Other.

The article being classified is a specially formulated raw material which is to be used in the manufacture of a shampoo. When NY 805283 was issued, Customs was interpreting the provisions of the HTSUS in such a way that shampoos which were claimed to provide some medical benefit were classified as medicaments in Chapter 30. Because the "KOPIX" was an active ingredient of the shampoo, it was classified in that chapter also.

However, Customs now believes that by applying the GRIs as instructed, and referring to the terms of the headings, shampoos are classified in subheading 3305.10, HTSUS. This classification is reinforced by the language of the ENs to heading 33.05 which state:

This heading covers:

(1) Shampoos containing soap or other organic surface-active agents (see Note 1 (c) to Chapter 34), and other shampoos. All these shampoos may contain subsidiary pharmaceutical or disinfectant constituents, even if they have therapeutic or prophylactic properties (see Note 1(d) to Chapter 30).

Note 1(d) to Chapter 30 states that "This Chapter [Pharmaceutical Products] does not cover ... (d) Preparations of headings 3303 to 3307, even if they have therapeutic or prophylactic properties."

Since "KOPIX" is imported in bulk, as an ingredient, it is not classifiable as a shampoo. By virtue of GRI 1, based upon its formulation, "KOPIX" is properly classified in subheading 3824.90.2800, HTSUS, because it is a mixture containing 5 percent or more by weight of one or more aromatic or modified aromatic substances.

*Holding:*

"KOPIX" imported in bulk form, is classified in subheading 3824.90.2800, HTSUS,

which provides for [p]repared binders for foundry molds or cores; chemical products and preparations of the chemical or allied industries (including those consisting of mixtures of natural products), not elsewhere specified or included; residual products of the chemical or allied industries, not elsewhere specified or included: [o]ther: [o]ther.

NY 805283, issued February 23, 1995, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

---

## MODIFICATION OF RULING LETTER AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF 3-NITROBENZALDEHYDE

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of modification of ruling letter and revocation of treatment relating to the tariff classification of 3-Nitrobenzaldehyde.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying a ruling pertaining to the tariff classification of 3-Nitrobenzaldehyde (CAS # 99-61-6) and is revoking any treatment previously accorded by the Customs Service to substantially identical transactions under the Harmonized Tariff Schedule of the United States (HTSUS). Notice of the proposed modification was published on September 13, 2000, in Volume 34, Number 37, of the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 2, 2001.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, Office of Regulations and Rulings (202) 927-2346.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North

American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that, in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, Customs published a notice in the September 13, 2000, CUSTOMS BULLETIN, Volume 34, Number 37, proposing to modify New York Ruling Letter (NY) D81515, dated October 20, 1998, and to revoke any treatment accorded to substantially identical merchandise. No comments were received in response to this notice.

As stated in the proposed notice, this modification will cover any rulings on this issue that may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to section 625(c)(1), is modifying NY D81515 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 963169 (Attachment "A" to this document). Additionally, pursuant to section 625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: October 17, 2000

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[Attachments]

---

[ATTACHMENT A]

*October 17, 2000*
CLA-2 RR:CR:GC 963169 AM
Category: CLASSIFICATION
Tariff No.: 2913.00.40

MS. JOAN VON DOEHREN
INTERCHEM CORPORATION
*120 Route 17 North*
*P.O. Box 1579*
*Paramus, N.J. 07653-1579*

Re: NY D81515 modified; 3-Nitrobenzaldehyde

DEAR MS. VON DOEHREN:

This is in reference to New York Ruling Letter (NY) D81515 issued to you on October 20, 1998, by the Director, Customs National Commodity Specialist Division, concerning the classification, under the Harmonized Tariff Schedule of the United States, (HTSUS), of 3-Nitrobenzaldehyde.

We have also reviewed the decision in New York Ruling Letter (NY) C83891, issued on February 13, 1998, by the Director, Customs National Commodity Specialist Division, concerning the classification of 3-Nitrobenzaldehyde. The classifications of 3-Nitrobenzaldehyde in these two rulings are in conflict and we have determined that the classification set forth in NY D81515 for that compound is in error. This ruling modifies NY D81515 with respect to the classification of 3-Nitrobenzaldehyde.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103-82, 107 Stat. 2057, 2186), notice of the proposed modification of NY D81515 was published on September 13, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 37. No comments were received in response to this notice.

*Facts:*

The substance 3-Nitrobenzaldehyde, has the chemical name $C_7H_5NO_3$, and the CAS registry #99-61-6. It is imported as a yellowish powder and used in the synthesis of dyes, surface active agents, and, as in the instant case, in pharmaceutical intermediates. *Hawley's Condensed Chemical Dictionary*, Eleventh Edition, 1999.

*Issue:*

Whether 3-Nitrobenzaldehyde is classified in heading 2912, HTSUS, as a cyclic aldehyde without oxygen function, or in heading 2913, HTSUS, as a nitrated derivative of an aldehyde.

*Law and Analysis:*

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 3 requires that when goods are *prima facie* classifiable under two or more headings, the most specific description is preferred, and if neither is more specific, that heading which occurs last in numerical order is used. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. *See*, T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

The following headings are relevant to the classification of this product:

2912 Aldehydes, whether or not with other oxygen function; cyclic polymers of aldehydes; paraformaldehyde:

Acyclic aldehydes without other oxygen function:

2912.29 Other [than Benzaldehyde]:

2912.29.60 Other [than Phenylacetaldehyde or 3,4 Dimethylbenzaldehyde; and p-Tolualdehyde]

* * * * * * * * * * * *

2913.00 Halogenated, sulfonated, nitrated or nitrosated derivatives of products of heading 2912:

Aromatic:

2913.00.40 Other [than 4-Fluoro-3-phenoxybenzaldehyde]

In NY D81515 this merchandise was classified in subheading 2912.29.60, HTSUS, because it is a cyclic aldehyde without oxygen function. However, 3-Nitrobenzaldehyde is also a nitrated derivative of an aldehyde. EN 29.12 lists Benzaldehyde as an aromatic aldehyde and explains that it is a "[H]ighly refrac-

tive, colourless liquid with a characteristic odour of bitter almonds; used in organic synthesis, in medicine, etc." with the chemical formula $C_6H_5.CHO$. EN 29.13 explains that Halogenated, sulfonated, nitrated or nitrosated derivatives of products of heading 2912:

> [These] are derived from aldehydes by replacing one or more of the hydrogen atoms (other than a hydrogen in the aldehyde group) (-CHO) by one or more halogens, sulpho groups ($-SO_3H$), nitro groups ($-NO_2$) or nitroso groups (-NO) or by any combination thereof. The most important is chloral (trichloroacetaldehyde) ($CCl_3.CHO$); anhydrous, mobile, colourless liquid with a penetrating odour; a hypnotic.
>
> This heading excludes chloral hydrate ($CCl_3.CH(OH)_2$) (2,2,2-trichloroethane-1,1-diol) which falls in heading 29.05.
>
> This heading also excludes aldehyde-bisulphite compounds which are classified as sulphonated derivatives of alcohols (headings 29.05 to 29.11).

3-Nitrobenzaldehyde is described specifically in subheading 2913.00.40 as an aromatic aldehyde which has been derived by the addition of a nitro functional group. Benzaldehyde, $C_7H_6O$, becomes 3-Nitrobenzaldehyde, $C_7H_5NO_3$, by the replacement of the hydrogen atom bonded to the #3 carbon on the benzene ring with a nitro ($NO_2$) functional group. Furthermore, 3-Nitrobenzaldehyde is not specifically excluded from heading 2913, HTSUS.

By operation of GRI 3(a), the heading which provides the more specific description is preferred. Heading 2913, HTSUS, more specifically describes the substance as a nitrated derivative of an aldehyde. Therefore, 3-Nitrobenzaldehyde was correctly classified in NY C83891 under subheading 2913.00.40, HTSUS, as a nitrated derivative of an aldehyde.

*Holding:*

3-Nitrobenzaldehyde is classified in subheading 2913.00.40, HTSUS, as a nitrated derivative of an aldehyde.

*Effect on Other Rulings:*

NY D81515 is modified with respect to the classification of 3-Nitrobenzaldehyde as described in this ruling letter.

In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

---

## MODIFICATION AND REVOCATION OF RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO TARIFF CLASSIFICATION OF ACOUSTICAL EYE LAG SCREWS

AGENCY: U. S. Customs Service, Department of the Treasury.

ACTION: Notice of modification and revocation of ruling letters and revocation of treatment relating to tariff classification of acoustical

eye lag screws.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modifying one ruling and revoking two other rulings relating to the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of acoustical eye lag screws. In addition, Customs is revoking any treatment previously accorded to substantially identical transactions. Notice of Customs proposal was published in the *Customs Bulletin* on September 13, 2000

EFFECTIVE DATE: This modification and revocation is effective for merchandise entered or withdrawn from warehouse for consumption on or after January 2, 2001.

FOR FURTHER INFORMATION CONTACT: James A. Seal, Commercial Rulings Division (202) 927-0760.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are informed compliance and shared responsibility. These concepts are based on the premise that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's rights and responsibilities under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable Customs to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to Customs obligations, a notice was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37, proposing to modify *NY* 834307, dated January 12, 1989, and to revoke *DD* 877436, dated September 4, 1992, and *NY* D80181, dated July 20, 1998, all of which classified lag screws as other wood screws, in subheading 7318.12.10 (now 12.00), Harmonized Tariff Schedule of the United States (HTSUS). No comments were received in response

to this notice.

As stated in the proposed notice, this modification and revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice, should have advised Customs during the comment period. Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during this notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying *NY* 834307 to reflect the proper classification of steel eye lag screws in subheading 7318.19.00, HTSUS, pursuant to the analysis in *HQ* 964412, which is set forth as "Attachment A" to this document. Customs is also revoking *DD* 877436 and *NY* D80181 to reflect the proper classification of lag screws, the subject of those decisions, in the same provision, pursuant to the analysis in *HQ* 964413 and *HQ* 964414, which are set forth as "Attachment B" and "Attachment C" to this document, respectively. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment it previously accorded to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), these rulings will become effective 60 days after publication in the Customs Bulletin.

Dated: October 16, 2000

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[Attachments]

[ATTACHMENT A]

*October 16, 2000*
CLA-2 RR:CR:GC 964412 JAS
Category: Classification
Tariff No.: 7318.19.00

MR. ALEX ROMERO, JR.
A. F. ROMERO & CO., INC.
*477 Railroad Blvd.*
*P.O. Box 989*
*Calexico, CA 92231-0989*

Re: *NY* 834307 Modified; Steel Eye Lag Screws

DEAR MR. ROMERO:

In *NY* 834307, which the then-Area Director of Customs (now the Director of Customs National Commodity Specialist Division), New York, issued to you on January 12, 1989, on behalf of Fabril Corporation, steel eye lag screws, among other goods, were held to be classifiable in subheading 7318.12.00, Harmonized Tariff Schedule of the United States (HTSUS), as other wood screws.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of *NY* 834307 was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37. No comments were received in response to that notice.

*Facts:*

The lag eye screws are of iron or steel construction and measure between 3 and 3 ¼ inches long and ¼ inch in diameter. The fasteners have tapered points and a steep cutting thread on one half of the fastener, and an unthreaded shank portion in the middle which culminates in a flat, paddle-shaped end with a circular eye cut in the middle. In use, these fasteners will be screwed into a beam or other wood portion of a ceiling and a T-bar framework for suspended acoustical ceilings secured by wires inserted through the eye.

The HTSUS provisions under consideration are as follows:

| | |
|---|---|
| 7318 | Screws, bolts, nuts, coach screws...and similar articles of iron or steel: |
| 7318.12.00 | Other wood screws |
| | Other screws and bolts, whether or not with their nuts or washers: |
| 7318.15.50 | Studs |
| 7318.19.00 | Other |

*Issue:*

Whether lag eye screws of iron or steel are provided for in heading 7318 as wood screws or as other threaded fasteners.

*Law and Analysis:*

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the

headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

In general, screws are externally threaded fasteners capable of being inserted into holes in assembled parts, of mating with a preformed internal thread or forming its own thread, and of being tightened or released by torquing the head. The ENs, on p. 1117 state that screws for wood differ from bolts and screws for metal in that they are tapered and pointed, and they have a steeper cutting thread since they have to bite their own way into the material. Further, wood screws almost always have slotted or recessed heads and they are never used with nuts.

Lag eye screws have tapered points and steep cutting threads common to wood screws, but lack slotted or recessed heads. The eye lag screws at issue lack a significant design feature of wood screws. In addition, heads are the means by which screws are normally tightened or released. In this case however, while the paddle-shaped end functions as the means by which this fastener is tightened or released, this end also has an eye, which is also the means by which the T-bar framework is suspended. This fastener has a significant, additional function not associated with other screws of subheading 7318.15, HTSUS. *See HQ* 959570, dated December 20, 1996.

Because these fasteners are designed so that one end is secured in a surface leaving a protuberance to which something else is attached, we considered whether they might be studs under subheading 731 8.15.50, HTSUS. However, the Courts have held that while the term stud is broadly defined and encompasses a number of articles, normally, the shank of a stud is embedded in a surface, leaving a threaded protuberance exposed to which an attachment might be made with a nut or otherwise. *See Fastening Devices. Inc. et al v. United States*, 40 Cust. Ct. 345, C.D. 2004 (1958). The eye lag screws do not function in this manner.

Finally, the Courts have held that reference to a "basket" provision such as subheading 731 8.19.00, HTSUS, is proper only when no other provision describes the merchandise more specifically. *See Hafele America Co.. Ltd.*, Slip Op. 94-1 88 (Ct. Int'l Trade, decided December 12, 1994). Such is the case here.

*Holding:*

There being no more specific provision describing this merchandise, we find that under the authority of GRI 1, the steel eye lag screws are provided for in heading 7318. They are classifiable in subheading 7318.19.00, HTSUS.

*Effect on Other Rulings:*

*NY* 834307, dated January 12, 1989, is modified as to this merchandise. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[ATTACHMENT B]

*October 16, 2000*
CLA-2 RR:CR:GC 964413 JAS
Category: Classification
Tariff No.: 7318.19.00

MR. WALTER ZIMMER
OMNITRANS CORPORATION, LTD.
*111 Broadway*
*New York, NY 10006*

Re: *DD* 877436 Revoked; Acoustical Lag Screws

DEAR MR. ZIMMER:

In *DD* 877436, which the District (now Port) Director of Customs, Los Angeles, issued to you on September 4, 1992, on behalf of Fastener Specialties, Inc., acoustical lag screws of zinc-plated steel, were held to be classifiable in subheading 7318.12.00, Harmonized Tariff Schedule of the United States (HTSUS), as other wood screws.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 03-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *DD* 877436 was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37. No comments were received in response to that notice.

*Facts*:

The screws were said to be available in lengths of 3, 4, and 5 inches. They have tapered points and a steep cutting thread on one half of the fastener, and an unthreaded shank portion in the middle which culminates in a flat, paddle-shaped end with a circular eye cut in the middle. In use, the screws will be twisted into a wooden beam and by attaching a wire through the screweye, will support the framework for a suspended acoustical ceiling.

The HTSUS provisions under consideration are as follows:

| | |
|---|---|
| 7318 | Screws, bolts, nuts, coach screws...and similar articles of iron or steel: |
| 7318.12.00 | Other wood screws |
| | Other screws and bolts, whether or not with their nuts or washers: |
| 7318.15.50 | Studs |
| 7318.19.00 | Other |

*Issue:*

Whether lag eye screws of iron or steel are provided for in heading 7318 as wood screws or as other threaded fasteners.

*Law and Analysis:*

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

In general, screws are externally threaded fasteners capable of being inserted into holes in assembled parts, of mating with a preformed internal thread or forming its own thread, and of being tightened or released by torquing the head. The ENs, on p. 1117 state that screws for wood differ from bolts and screws for metal in that they are tapered and pointed, and they have a steeper cutting thread since they have to bite their own way into the material. Further, wood screws almost always have slotted or recessed heads and they are never used with nuts.

Lag eye screws have tapered points and steep cutting threads common to wood screws, but lack slotted or recessed heads. The eye lag screws at issue lack a significant design feature of wood screws. In addition, heads are the means by which screws are normally tightened or released. In this case however, while the paddle-shaped end functions as the means by which this fastener is tightened or released, this end also has an eye, which is also the means by which the T-bar framework is suspended. This fastener has a significant, additional design feature that imparts a function not associated with other screws of subheading 7318.15, HTSUS. *See HQ* 959570, dated December 20, 1996.

Because these fasteners are designed so that one end is secured in a surface leaving a protuberance to which something else is attached, consideration was given to the provision for "studs" of subheading 731 8.15.50, HTSUS. However, the Courts have held that while the term stud is broadly defined and encompasses a number of articles, normally, the shank of a stud is embedded in a surface, leaving a threaded protuberance exposed to which an attachment might be made with a nut or otherwise. *See Fastening Devices. Inc. et al v. United States*, 40 Cust. Ct. 345, C.D. 2004 (1958). The eye lag screws do not function in this manner.

Finally, the Courts have held that reference to a "basket" provision such as subheading 731 8.19.00, HTSUS, is proper only when no other provision describes the merchandise more specifically. *See Hafele America Co.. Ltd.*, Slip Op. 94-1 88 (Ct. Int'l Trade, decided December 12, 1994). Such is the case here.

*Holding:*

There being no more specific provision describing this merchandise, we find that under the authority of GRI 1, the steel eye lag screws are provided for in heading 7318. They are classifiable in subheading 7318.19.00, HTSUS.

*Effect on Other Rulings:*

*DD* 877436, dated September 4, 1992, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[ATTACHMENT C]

*October 16, 2000*
CLA-2 RR:CR:GC 64414 JAS
Category: Classification
Tariff No.: 7318.19.00

MR. LEO W. PARTYKA
LEO W. PARTYKA, INC.
*2300 E. Higgins Road, Suite 303*
*Elk Grove, IL 60007*

Re: *NY* D80181 Revoked; Lag Screws

DEAR MR. PARTYKA:

In *NY* D80181, which the Director of Customs National Commodity Specialist Division, New York, issued to you on July 20, 1998, on behalf of Convenience Concepts Inc., certain lag screws were held to be classifiable in subheading 7318.12.10 (now 12.00), Harmonized Tariff Schedule of the United States (HTSUS), as other wood screws. We have reconsidered this classification and now believe that it is incorrect.

Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057, 2186 (1993), notice of the proposed revocation of *NY* D80181 was published on September 13, 2000, in the *Customs Bulletin*, Volume 34, Number 37. No comments were received in response to that notice.

*Facts:*

The lag eye screws, noted on the sample package you submitted as part no. 5051 were described as lag screws. They are of steel construction, approximately 2 ¾ inches long, and are used in suspended ceiling installations. They were not further described.

The HTSUS provisions under consideration are as follows:

| | |
|---|---|
| 7318 | Screws, bolts, nuts, coach screws...and similar articles of iron or steel: |
| 7318.12.00 | Other wood screws |
| | Other screws and bolts, whether or not with their nuts or washers: |
| 7318.15.50 | Studs |
| 7318.19.00 | Other |

*Issue:*

Whether steel lag screws are provided for in heading 7318 as wood screws, as other screws, or as other threaded fasteners.

*Law and Analysis:*

Under General Rule of Interpretation (GRI) 1, Harmonized Tariff Schedule of the United States (HTSUS), goods are to be classified according to the terms of the headings and any relative section or chapter notes, and provided the headings or notes do not require otherwise, according to GRIs 2 through 6.

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System. While not legally binding, the ENs provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the System. Customs believes the ENs should always be consulted. See T.D. 89-80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989).

In general, screws are externally threaded fasteners capable of being inserted into holes in assembled parts, of mating with a preformed internal thread or forming its own thread, and of being tightened or released by torquing the head. The ENs, on p. 1117 state that screws for wood differ from bolts and screws for metal in that they are tapered and pointed, and they have a steeper cutting thread since they have to bite their own way into the material. Further, wood screws almost always have slotted or recessed heads and they are never used with nuts.

Lag eye screws have tapered points and steep cutting threads common to wood screws, but lack slotted or recessed heads. The eye lag screws at issue lack a significant design feature of wood screws. In addition, heads are the means by which screws are normally tightened or released. In this case however, while the paddle-shaped end functions as the means by which this fastener is tightened or released, this end also has an eye, which is also the means by which the T-bar framework is suspended. This fastener has a significant, additional design feature that imparts a function not associated with other screws of subheading 7318.15, HTSUS. *See HQ* 959570, dated December 20, 1996.

Because these fasteners are designed so that one end is secured in a surface leaving a protuberance to which something else is attached, we considered whether they might be studs under subheading 7318.15.50, HTSUS. However, the Courts have held that while the term stud is broadly defined and encompasses a number of articles, normally, the shank of a stud is embedded in a surface, leaving a threaded protuberance exposed to which an attachment might be made with a nut or otherwise. *See Fastening Devices, Inc. et al v. United States*, 40 Cust. Ct. 345, C.D. 2004 (1958). The eye lag screws do not function in this manner.

Finally, the Courts have held that reference to a "basket" provision such as subheading 7318.19.00, HTSUS, is proper only when no other provision describes the merchandise more specifically. *See Hafele America Co., Ltd.*, Slip Op. 94-188 (Ct. Int'l Trade, decided December 12, 1994). Such is the case here.

*Holding:*

There being no more specific provision describing this merchandise, we find that under the authority of GRI 1, the steel eye lag screws noted on the submitted sample package as part no. 5051, are provided for in heading 7318. They are classifiable in subheading 7318.19.00, HTSUS.

*Effect on Other Rulings:*

*NY* D80181, dated July 20, 1998, is revoked. In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

## REVOCATION OF RULING LETTERS AND TREATMENT RELATING TO TARIFF CLASSIFICATION OF COENZYME $Q_{10}$

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of ruling letters and treatment relating to the tariff classification of Coenzyme $Q_{10}$.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625 (c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking two rulings pertaining to the tariff classification of Coenzyme $Q_{10}$ (CAS # 303-98-0) and is revoking any treatment previously accorded by the Customs Service to substantially identical transactions under the Harmonized Tariff Schedule of the United States (Annotated) (HTSUSA). Notice of the proposed revocations was published on August 30, 2000, in Volume 34, Number 35, of the CUSTOMS BULLETIN. No comments were received in response to this notice.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after January 2, 2001.

FOR FURTHER INFORMATION CONTACT: Allyson Mattanah, General Classification Branch, Office of Regulations and Rulings (202) 927-2346.

SUPPLEMENTARY INFORMATION:

### BACKGROUND

On December 8, 1993, Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057) (hereinafter "Title VI") became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that, in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information nec-

essary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, Customs published a notice in the August 30, 2000, CUSTOMS BULLETIN, Volume 34, Number 35, proposing to revoke Customs Headquarters ruling (HQ) 953627, dated July 26,1993, and New York ruling (NY) 864936, dated August 1, 1991, and to revoke any treatment accorded to substantially identical merchandise. No comments were received in response to this notice.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's reliance on a treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice which was not identified in this notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations subsequent to the effective date of this final decision.

Customs, pursuant to section 625(c)(1), is revoking HQ 953627 and NY 864936 and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letters (HQ) 964415 and (HQ) 964416 set forth as attachments "A" and "B", respectively. Additionally, pursuant to section 625(c)(2), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: October 16, 2000

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

[Attachments]

---

[ATTACHMENT A]

*October 16, 2000*
CLA-2 RR:CR:GC 964415 AM
Category: CLASSIFICATION
Tariff No.: 2914.69.90

MR. EDMUND J. CORBOY
AUSTIN CHEMICAL COMPANY, INC.
*9655 West Bryn Mawr Avenue*
*Rosemont, IL 60018-5299*

Re: HQ 953627 and NY 864936 revoked; "Coenzyme $Q_{10}$"

DEAR MR. CORBOY:

This is in reference to NY 864936 issued to you on August 1, 1991, concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of Coenzyme $Q_{10}$.

We have reviewed the decision in NY 864936, as well as the decision in HQ 953627, issued on July 26, 1993, and have determined that the classification set forth in those rulings for Coenzyme $Q_{10}$ is in error. This ruling revokes NY 864936. HQ 953627 is revoked by HQ 964416 of this date.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, (Pub. L. 103-82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY 864936 and HQ 953627 was published on August 30, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 35. No comments were received in response to this notice.

*Facts:*

Coenzyme $Q_{10}$, also known as Ubiquinone 50 and ubidecarenone, has the chemical structure $C_{59}H_{90}O_4$, and the chemical name 2-(3, 7, 11, 15, 19, 23, 27, 31, 35, 39 - decamethyl - 2, 6, 10, 14, 18, 22, 30, 34, 38-tetracontadecaenyl)-5, 6-dimethoxy-3-methyl-1, 4-benzoquinone. Ubidecarenone has a CAS registry # 303-98-0 and is listed in Table 1 to the Pharmaceutical Appendix to the Tariff Schedule. It is imported in bulk as a yellow to orange crystalline powder.

According to the Merck Index, §9974, 1679, (Twelfth Edition, Merck & Co., Inc., 1996), Coenzyme $Q_{10}$ is one of a family of organic chemical compounds known predominantly as ubiquinones, but also called coenzymes Q. Ubiquinone structures are based on the 2,3-dimethoxy-5-methylbenzo-quinone nucleus with a variable terpenoid side chain containing one to twelve mono-unsaturated trans-isoprenoid units with 10 units being the most common in animals. According to the existing dual system of nomenclature, the compounds can be described as coenzyme $Q_n$, where n = 1 - 12 and represents the number of terpenoid units in the side chain or ubiquinone (x), where x is any multiple of 5 and designates the total number of carbon atoms in the side chain. Differences in properties are due to the difference in the length of the side chain. Naturally occurring members are the coenzymes $Q_6$-$Q_{10}$. The entire series has been prepared synthetically. *Id.*

Merck also assigns a therapeutic category of "Cardiotonic" to Coenzyme $Q_{10}$. The Explanatory Notes of the Merck Index state:

*Therapeutic Category and Therapeutic Category (Veterinary).* In most cases,

therapeutic categories correspond to those published in the *USP Dictionary of USAN and International Drug Names*. However, in instances where there is no listing, or where the USAN Council has listed a mechanism of action, a therapeutic category has been assigned which most closely describes the indication claimed by the manufacturer, or reported in the clinical literature. When available, mode of action information is included in the literature references section of the monograph. Monographs for human drugs have been indexed by both therapeutic category and biological activity beginning on page THER-1.
*Id.* at xi.

Coenzyme $Q_{10}$, ubiquinone or ubidecarenone are not listed in the Therapeutic Category and Biological Activity Index (THER-1 and following). Moreover, in the 2000 edition of the *USP Dictionary of USAN and International Drug Names*, 748, (U.S. Pharmocopeia, 2000), the "Ubidecarenone" listing does not contain a description of a "therapeutic category" or "mechanism of action."

Ubiquinone has recently been designated as an Orphan Product by the Food and Drug Administration (FDA) (*see* "List of Orphan Product Designations for December 1999") as a substance used in the "treatment of mitochondrial cytopathies." To this date, however, a marketing date has not been assigned. Atovaquone, an analog of ubiquinone, has been approved for marketing as an Orphan Drug in the treatment of *Pneumocystis carinii*, an opportunistic infection most commonly affecting people with AIDS. However, an analog of a substance is not the substance itself. Moreover, The Orphan Drug Act (21 U.S.C. 360, *et seq.*) defines Orphan products as ones used to treat diseases or conditions affecting fewer than 200,000 persons in the United States. Such small patient populations reduce profit potential for sponsors, so the Act grants special privileges and marketing incentives.

*Issue:*

Whether "ubiquinone or Coenzyme $Q_{10}$" imported as a yellow to orange crystalline powder is classified in subheading 2914.69.20, HTSUS, the provision for "[K]etones and quinones . . .: [O]ther: [D]rug," or in subheading 2914.69.90, HTSUS, the provision for "[K]etones and quinones . . .: [O]ther: [O]ther."

*Law and Analysis:*

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any related section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. See, T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

Heading 2914, HTSUS, is the only heading at issue. Under GRI 6, the following subheadings are relevant to the classification of this product:

2914 Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated, or nitrosated derivatives (con.):

* * * * *

2914.69 Other:

2914.69.2000 Drugs

* * * * *

2914.69.9000 Other

In both HQ 953627 and NY 864936, this merchandise was classified in subheading 2914.69.20, HTSUS, due to the erroneous assumption that it has therapeutic properties as a cardiovascular drug or pharmaceutical intermediate. Chapter 29 of the HTSUS, with exceptions inapplicable here, provides only for "[s]eparate chemically defined organic compounds, whether or not containing impurities." Note 1(a), Chapter 29, HTSUS. Hence, the instant merchandise, an unmixed compound, imported in bulk for incorporation within pharmaceutical or other products, is appropriately classified in Chapter 29, HTSUS.

However, the "drugs" provisions of Chapter 29 have a specific meaning as enunciated in *Lonza, Inc. v. U.S.*, 46 F.3d 1098 (Fed. Cir. 1995). The first part of the Lonza test requires that a substance have "therapeutic or medicinal" properties. "Therapeutic" and "medicinal" have been judicially construed to mean "[h]aving healing or curative powers" and "curing, healing, or relieving," respectively. The second requirement for classification as "drugs" under *Lonza* is that substances be "chiefly used as medicines or as ingredients in medicines." The phrase "chiefly used" indicates that classification as a drug depends upon principal use. "[A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation . . .." Additional U.S. Rule of Interpretation 1(a), HTSUS. (See also "Guidance Concerning the Tariff Classification of Pharmaceutical Products Imported for Clinical Research," May 24, 2000, CUSTOMS BULLETIN, Vol. 34, No. 21.)

These goods are not chiefly imported for pharmaceutical research or therapeutic treatment. The therapeutic category assigned to ubiquinone in the Merck Index is not dispositive. This category was most probably assigned according to the information "reported in the clinical literature." While a large amount of material published in the scientific literature indicates that Coenzyme $Q_{10}$ possesses medicinal properties, we were unable to locate any reference to Coenzyme $Q_{10}$ which would lead us to believe that it is principally used as a medicine or as an ingredient in a medicine.

Even though the substance has recently been designated an Orphan product, this is not sufficient to classify the substance under the drug provisions of the HTSUS for tariff purposes. By definition, Orphan drugs are useful to less than 200,000 people in this country. Furthermore, ubiquinone is not presently marketed, even as an Orphan drug, for treatment of mytochondrial cytopathies, or any other known condition or disease. Instead, the substance is marketed as a dietary supplement in compliance with the Dietary Supplement Health and Education Act of 1994 containing the legally required disclaimer that "the product is not intended to diagnose, treat, cure or prevent any disease." It therefore can not be argued that Coenzyme $Q_{10}$ is principally used as a therapeutic substance "having healing or curative powers."

Nor can it be argued that inclusion in the Pharmaceutical Appendix of the HTSUS automatically imbues a substance with therapeutic properties. The Pharmaceutical Appendix was incorporated into the HTSUS by Presidential Proclamation. See Proclamation No. 6763, 60 Fed. Reg. 1007 (1994). This Proclamation also added General Note 13 to the HTSUS. General Note 13 states that whenever a rate of duty of "Free" followed by the symbol "K" in parentheses appears in the "Special" column for a tariff provision, products classifiable in such provision shall be entered free of duty, provided that such product is listed in the Pharmaceutical Appendix.

The Pharmaceutical Appendix does not broaden or narrow the scope of the "drugs" provisions. There are 54 eight-digit "drugs" provisions within Chapter 29, HTSUS, which are subject to duty. Each of these provisions has a "K" in the "Special' column, indicating that drugs, which are included in the Pharmaceutical Appendix, are duty-free while drugs not included in the Pharmaceutical Appendix are subject to duty.

The statement of administrative action and subsequent presidential proclamations (adding items to the Pharmaceutical Appendix) indicate that inclusion within the Pharmaceutical Appendix is the means by which duty-free treatment is to be extended to new pharmaceuticals. A product need not be considered a "drug" in order to be included in the Pharmaceutical Appendix. In fact, a "K" appears in the "Special" column adjacent to subheading 2914.69.90, HTSUS, the non-drug provision considered here.

*Holding:*

Coenzyme $Q_{10}$ is classified in subheading, 2914.69.90, HTSUS, the provision for "[K]etones and quinones . . .: [O]ther: [O]ther"

*Effect on Other Rulings:*

This ruling revokes NY 864936, dated August 1, 1991. HQ 964416 revokes HQ 953627, dated July 26, 1993.

In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

---

[ATTACHMENT B]

*October 16, 2000*
CLA-2 RR:CR:GC 964416 AM
Category: CLASSIFICATION
Tariff No.: 2914.69.90

LAWRENCE D. BLUME
GRAHAM & JAMES
*2000 M St., N.W., #700*
*Washington, D.C. 20036*

Re: HQ 953627 and NY 864936 revoked; "Coenzyme $Q_{10}$"

DEAR MR. BLUME:

This is in reference to HQ 953627 issued by this office on July 26, 1993, in response to protest #1001-92-107065, which you filed on behalf of Kyowa Hakko USA Corp., concerning the classification, under the Harmonized Tariff Schedule of the United States (HTSUS), of Coenzyme $Q_{10}$.

We have reviewed the decision in HQ 953627, as well as the decision in NY 864936, issued on August 1, 1991, and have determined that the classification set forth in those rulings for Coenzyme $Q_{10}$ is in error. This ruling revokes HQ 953627. NY 864936 is revoked by HQ 964415 of this date.

Pursuant to section 625(c)(1) Tariff Act of 1930 (19 U.S.C. 1625(c)(1)) as amended by section 623 of Title VI (Customs Modernization) of the North American Free

Trade Agreement Implementation Act, (Pub. L. 103-82, 107 Stat. 2057, 2186), notice of the proposed revocation of NY 864936 and HQ 953627 was published on August 30, 2000, in the CUSTOMS BULLETIN, Volume 34, Number 35. No comments were received in response to this notice.

*Facts:*

Coenzyme $Q_{10}$, also known as Ubiquinone 50 and ubidecarenone, has the chemical structure $C_{59}H_{90}O_4$, and the chemical name 2-(3, 7, 11, 15, 19, 23, 27, 31, 35, 39 - decamethyl - 2, 6, 10, 14, 18, 22, 30, 34, 38-tetracontadecaenyl)-5, 6-dimethoxy-3-methyl-1, 4-benzoquinone. Ubidecarenone has a CAS registry # 303-98-0 and is listed in Table 1 to the Pharmaceutical Appendix to the Tariff Schedule. It is imported in bulk as a yellow to orange crystalline powder.

According to the Merck Index, §9974, 1679, (Twelfth Edition, Merck & Co., Inc., 1996), Coenzyme $Q_{10}$ is one of a family of organic chemical compounds known predominantly as ubiquinones, but also called coenzymes Q. Ubiquinone structures are based on the 2,3-dimethoxy-5-methylbenzo-quinone nucleus with a variable terpenoid side chain containing one to twelve mono-unsaturated trans-isoprenoid units with 10 units being the most common in animals. According to the existing dual system of nomenclature, the compounds can be described as coenzyme $Q_n$, where n = 1 - 12 and represents the number of terpenoid units in the side chain or ubiquinone (x), where x is any multiple of 5 and designates the total number of carbon atoms in the side chain. Differences in properties are due to the difference in the length of the side chain. Naturally occurring members are the coenzymes $Q_6$-$Q_{10}$. The entire series has been prepared synthetically. *Id.*

Merck also assigns a therapeutic category of "Cardiotonic" to Coenzyme $Q_{10}$. The Explanatory Notes of the Merck Index state:

> *Therapeutic Category and Therapeutic Category (Veterinary).* In most cases, therapeutic categories correspond to those published in the *USP Dictionary of USAN and International Drug Names*. However, in instances where there is no listing, or where the USAN Council has listed a mechanism of action, a therapeutic category has been assigned which most closely describes the indication claimed by the manufacturer, or reported in the clinical literature. When available, mode of action information is included in the literature references section of the monograph. Monographs for human drugs have been indexed by both therapeutic category and biological activity beginning on page THER-1.
> *Id.* at xi.

Coenzyme $Q_{10}$ ubiquinone or ubidecarenone are not listed in the Therapeutic Category and Biological Activity Index (THER-1 and following). Moreover, in the 2000 edition of the *USP Dictionary of USAN and International Drug Names*, 748, (U.S. Pharmocopeia, 2000), the "Ubidecarenone" listing does not contain a description of a "therapeutic category" or "mechanism of action."

Ubiquinone has recently been designated as an Orphan Product by the Food and Drug Administration (FDA) (*see* "List of Orphan Product Designations for December 1999") as a substance used in the "treatment of mitochondrial cytopathies." To this date, however, a marketing date has not been assigned. Atovaquone, an analog of ubiquinone, has been approved for marketing as an Orphan Drug in the treatment of Pneumocystis carinii, an opportunistic infection most commonly affecting people with AIDS. However, an analog of a substance is not the substance itself. Moreover, The Orphan Drug Act (21 U.S.C. 360, et seq.) defines Orphan products as ones used to treat diseases or conditions affecting fewer than 200,000 persons in the United States. Such small patient populations reduce profit potential for sponsors, so the Act grants special privileges and marketing incentives.

*Issue:*

Whether "ubiquinone or Coenzyme $Q_{10}$" imported as a yellow to orange crystalline powder is classified in subheading 2914.69.20, HTSUS, the provision for "[K]etones and quinones . . .: [O]ther: [D]rug," or in subheading 2914.69.90, HTSUS, the provision for "[K]etones and quinones . . .: [O]ther: [O]ther."

*Law and Analysis:*

Merchandise imported into the U.S. is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context that requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any related section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. GRI 6 requires that the classification of goods in the subheadings of headings shall be determined according to the terms of those subheadings, any related subheading notes and *mutatis mutandis*, to the GRIs. In interpreting the HTSUS, the Explanatory Notes (ENs) of the Harmonized Commodity Description and Coding System may be utilized. The ENs, although not dispositive or legally binding, provide a commentary on the scope of each heading, and are generally indicative of the proper interpretation of the HTSUSA. See T.D. 89-80, 54 Fed. Reg. 35127 (August 23, 1989).

Heading 2914, HTSUS, is the only heading at issue. Under GRI 6, the following subheadings are relevant to the classification of this product:

2915Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated, or nitrosated derivatives (con.):

2914 Ketones and quinones, whether or not with other oxygen function, and their halogenated, sulfonated, nitrated, or nitrosated derivatives (con.):

* * * * *

2914.69 Other:

2914.69.2000 Drugs

* * * * *

2914.69.9000 Other

In both HQ 953627 and NY 864936, this merchandise was classified in subheading 2914.69.20, HTSUS, due to the erroneous assumption that it has therapeutic properties as a cardiovascular drug or pharmaceutical intermediate. Chapter 29 of the HTSUS, with exceptions inapplicable here, provides only for "[s]eparate chemically defined organic compounds, whether or not containing impurities." Note 1(a), Chapter 29, HTSUS. Hence, the instant merchandise, an unmixed compound, imported in bulk for incorporation within pharmaceutical or other products, is appropriately classified in Chapter 29, HTSUS.

However, the "drugs" provisions of Chapter 29 have a specific meaning as enunciated in *Lonza, Inc. v. U.S.*, 46 F.3d 1098 (Fed. Cir. 1995). The first part of the Lonza test requires that a substance have "therapeutic or medicinal" properties. "Therapeutic" and "medicinal" have been judicially construed to mean "[h]aving healing or curative powers" and "curing, healing, or relieving," respectively. The second requirement for classification as "drugs" under *Lonza* is that substances be "chiefly used as medicines or as ingredients in medicines." The phrase "chiefly

used" indicates that classification as a drug depends upon principal use. "[A] tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation . . .." Additional U.S. Rule of Interpretation 1(a), HTSUS. (See also "Guidance Concerning the Tariff Classification of Pharmaceutical Products Imported for Clinical Research," May 24, 2000, CUSTOMS BULLETIN, Vol. 34, No. 21.)

These goods are not chiefly imported for pharmaceutical research or therapeutic treatment. The therapeutic category assigned to ubiquinone in the Merck Index is not dispositive. This category was most probably assigned according to the information "reported in the clinical literature." While a large amount of material published in the scientific literature indicates that Coenzyme $Q_{10}$ possesses medicinal properties, we were unable to locate any reference to Coenzyme $Q_{10}$ which would lead us to believe that it is principally used as a medicine or as an ingredient in a medicine.

Even though the substance has recently been designated an Orphan product, this is not sufficient to classify the substance under the drug provisions of the HTSUS for tariff purposes. By definition, Orphan drugs are useful to less than 200,000 people in this country. Furthermore, ubiquinone is not presently marketed, even as an Orphan drug, for treatment of mytochondrial cytopathies, or any other known condition or disease. Instead, the substance is marketed as a dietary supplement in compliance with the Dietary Supplement Health and Education Act of 1994 containing the legally required disclaimer that "the product is not intended to diagnose, treat, cure or prevent any disease." It therefore can not be argued that Coenzyme $Q_{10}$ is principally used as a therapeutic substance "having healing or curative powers."

Nor can it be argued that inclusion in the Pharmaceutical Appendix of the HTSUS automatically imbues a substance with therapeutic properties. The Pharmaceutical Appendix was incorporated into the HTSUS by Presidential Proclamation. See Proclamation No. 6763, 60 Fed. Reg. 1007 (1994). This Proclamation also added General Note 13 to the HTSUS. General Note 13 states that whenever a rate of duty of "Free" followed by the symbol "K" in parentheses appears in the "Special" column for a tariff provision, products classifiable in such provision shall be entered free of duty, provided that such product is listed in the Pharmaceutical Appendix.

The Pharmaceutical Appendix does not broaden or narrow the scope of the "drugs" provisions. There are 54 eight-digit "drugs" provisions within Chapter 29, HTSUS, which are subject to duty. Each of these provisions has a "K" in the "Special' column, indicating that drugs, which are included in the Pharmaceutical Appendix, are duty-free while drugs not included in the Pharmaceutical Appendix are subject to duty.

The statement of administrative action and subsequent presidential proclamations (adding items to the Pharmaceutical Appendix) indicate that inclusion within the Pharmaceutical Appendix is the means by which duty-free treatment is to be extended to new pharmaceuticals. A product need not be considered a "drug" in order to be included in the Pharmaceutical Appendix. In fact, a "K" appears in the "Special" column adjacent to subheading 2914.69.90, HTSUS, the non-drug provision considered here.

*Holding:*

Coenzyme $Q_{10}$ is classified in subheading, 2914.69.90, HTSUS, the provision for "[K]etones and quinones . . .: [O]ther: [O]ther"

*Effect on Other Rulings:*

This ruling revokes HQ 953627, dated July 26, 1993, and HQ 964415 revokes NY 864936, dated August 1, 1991.

In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

MARVIN AMERNICK
*(for John Durant, Director*
*Commercial Rulings Division)*

# United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

*Chief Judge*

Gregory W. Carman

*Judges*

Jane A. Restani
Thomas J. Anquilino, Jr.
Richard W. Goldberg
Donald C. Payne
Evan J. Wallach
Judith M. Barzilay
Delissa Ann Ridgway

*Senior Judges*

James L. Watson
Hebert N. Maletz
Nicholas Tsoucalas
R. Kenton Musgrave

*Clerk*

Leo M. Gordon

# Decisions of the United States Court of International Trade

(Slip Op. 00 - 120)

SAVE DOMESTIC OIL, INC., PLAINTIFF, *v.* UNITED STATES, DEFENDANT, AND- API AD HOC FREE TRADE COMMITTEE *ET ALIA*, INTERVENOR-DEFENDANTS.

Court No. 99-09-00558

[Plaintiff's motion for judgment on the agency record granted; remanded to the International Trade Administration.]

Decided: September 19, 2000

*Wiley, Rein & Fielding* (*Charles Owen Verrill, Jr.* and *Timothy C. Brightbill*) for the plaintiff.

*David W. Ogden*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*A. David Lafer* and *Lucius B. Lau*); and Office of Chief Counsel for Import Administration, U.S. Depart-ment of Commerce (*Robert J. Heilferty*), of counsel, for the defendant.

*Dewey Ballantine LLP* (*Harry L. Clark, Michael H. Stein, Bradford L. Ward* and *John W. Bohn*) for intervenor-defendant API Ad Hoc Free Trade Committee.

*White & Case* (*Carolyn B. Lamm, Adams C. Lee* and *David L. Elmont*) for intervenor-defendant Saudi Arabian Oil Company.

*Shearman & Sterling* (*Thomas B. Wilner, Jeffrey M. Winton* and *Jeronimo Gomez del Campo*) for intervenor-defendants Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation.

*O'Melveny & Myers LLP* (*Gary N. Horlick* and *Michael A. Meyer*) for intervenor-defendants Petróleos Mexicanos, P.M.I. Comercio Internacional S.A. de C.V., and PEMEX Exploración y Producción.

*King & Spalding* (*Joseph W. Dorn* and *Duane W. Layton*) for intervenor-defendant Texaco Inc.

*Barnes, Richardson & Colburn* (*Robert E. Burke, Brian F. Walsh* and *Robert F. Seely*) for intervenor-defendant BP Amoco.

OPINION & ORDER

AQUILINO, Judge: This case arises from the filing a year ago with the International Trade Administration, U.S. De-partment of Commerce ("ITA") and the U.S. International Trade Commission ("ITC") of a nine-volume Petition for the Imposition of Antidumping and Countervailing Duties on certain crude petroleum oil products from Iraq, México, Saudi Arabia and Venezuela. The petitioner was stated to be an incorporated consortium of independent domestic crude

petroleum oil producers, Save Domes-tic Oil, Inc. ("SDO"), the individual members of which were named Apache Corporation (Houston, Tex.), Arrow Oil & Gas, Inc. (Norman, Okla.), BOGO Energy Corp. (Oklahoma City, Okla.), Con-tinental Resources, Inc. (Enid, Okla.), Crescent Exploration (Oklahoma City), Farrar Oil Company (Mt. Vernon, Ill.), Hough- ton Oil & Gas, Inc. (Midland, Tex.), Keener Oil & Gas Company (Tulsa, Okla.), Phoenix Production Co. (Cody, Wyo.), Pickrell Drilling Co., Inc. (Great Bend, Kan.), Royal Drilling & Producing, Inc. (Crossville, Ill.), and Tilley Oil & Gas, Inc. (Enid). The petition requested that the ITA and ITC

> undertake a "regional industry" analysis in determining industry support, market penetration and injury to the domestic crude petroleum oil industry caused by subjectimports[,] . . . defin[ing] th[e] regional market to include, generally, the District of Columbia and the 43 contiguous States (and the U.S. Outer Continental Shelf in the Gulf of Mexico), exclusive of Washington, Oregon, California, Arizona, and Nevada.[1]

Some 40 days later, while finding the petitioner to be an "interested party" within the meaning of 19 U.S.C. §1677(9) and that it had made "an adequate regional-industry claim for initiation purposes", the ITA did not accept the petition on the ground that it "did not have the required industry support". *Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Pe-troleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela*, 64 Fed.Reg. 44,480 (Aug. 16, 1999). Whereupon this case commenced, seeking judicial review and reversal of this determination.

I

Public information of the Department of Commerce[2] shows over one thousand one hundred petitions to have been filed with the ITA since enactment of the Trade Agreements Act of 1979, yet apparently only one was subjected to the kind of threshold agency rejection at issue herein. *See Carbon Steel Plate From Belgium and the Federal Republic of Germany; Rescission of Notice Announcing Initiation of Antidumping Investigations and Dismissal of Petition*, 49 Fed.Reg. 3,503 (Jan. 27, 1984) (producers of well over 95 percent of subject

---

[1] ITA Record Document ("R.Doc") 1, vol. I, p. 2. This re-gion was also described in terms of U.S. "Petroleum Administra-tion for Defense Districts" or "PADD"s I to IV. *See id* at 3. *See also id*. at 4 ("The Region Is A Market Separate From The Rest Of The United States").

[2] U.S. Import Administration, *Antidumping Investigations Case Activity (January 1, 1980 - December 31, 1999)*, at <http:// ia.ita.doc.gov/stats/ad8099.htm>; *Countervailing Duty Case Ac-tivity (January 1, 1980 - December 31, 1999), at <http:/ /ia.-ita.doc.gov/stats/cv8099.htm>*.

merchandise opposed single-producer petition). In fact, only 17 other petitions are reported as having been summarily dismissed by the ITA over the last 20 years. Ten of them were found not to allege a basis upon which antidumping or countervailing duties could be imposed.[3], 45 Fed.Reg. 67,404 (Oct. 10, 1980). Another three petitions were dismissed because there had been no or *de minimis* imports of the subject merchandise in the years immediately preceding their respective filings.[4] Fed.Reg. 5,752 (Feb. 8, 1982); *Initiation of Countervailing Duty Investigations / Dismissal of Countervailing Duty Petition Certain Steel Products From Luxembourg*, 47 Fed.Reg. 5,750 (Feb. 8, 1982); *Initiation of Countervailing Duty Investigations / Dismissal of Countervailing Duty Petitions; Certain Steel Products From the Netherlands*, 47 Fed.Reg. 5,743 (Feb. 8, 1982). And four were found not to have been presented by an interested party.[5]

A

Be then all those other, apparently facially-accepta-ble petitions as they were, from the beginning the Trade Agreements Act has contemplated ITA dismissal of petitions deemed not in compliance with the threshold standards set by Congress. As amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (Dec. 8, 1994), (and by the Miscellaneous Trade and Technical Corrections Act of 1996, Pub. L. No. 104-295, 110 Stat. 3514 (Oct. 11, 1996)), the statute governing procedures for initiating herein an antidumping-duty investigation provided, in part, as follows:

**(b) Initiation by petition**

**(1) Petition requirements**

An antidumping proceeding shall be initiated whenever an interested party described in subparagraph (C),(D),(E),(F), or (G) of section 1677(9) of this title files a petition with the [ITA], on behalf of

---

[3] *See Pure and Alloy Magnesium From Norway: Final Negative Determination; Rescission of Investigation and Partial Dismissal of Petition*, 57 Fed.Reg. 30,942 (July 13, 1992); *Pure and Alloy Magnesium From Canada: Final Affirmative Determination; Rescis-sion of Investigation and Partial Dismissal of Petition*, 57 Fed.- Reg. 30,939 (July 13, 1992); *Rescission of Initiation of Coun-tervailing Duty Investigation and Dismissal of Petition: Chrome-Plated Lug Nuts and Wheel Locks From the People's Republic of China ("PRC")*; 57 Fed. Reg. 10,459 (March 26, 1992); *Dismissa of Countervailing Duty Petition and Termination of Proceeding: Pure and Alloy Magnesium From Norway*, 56 Fed.Reg. 49,748 (Oct. 1, 1991); *Partial Rescission of Initiation of Antidumping Investiga-tions and Dismissal of Petitions; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From Romania, Singapore, and Thailand*, 53 Fed.Reg. 39,327 (Oct. 6, 1988); *Potassium Chloride From the Soviet Union; Rescission of Initiation of Countervailing Duty Investigation and Dismissal of Petition*, 49 Fed.Reg. 23,428 (June 6, 1984); *Potassium Chloride From the German Democratic Republic; Rescission of Initiation of Coun-tervailing Duty Investigation and Dismissal of Petition*, 49 Fed.Reg. 23,428 (June 6, 1984); *Fresh Cut Roses From Colombia; Dismissal of Antidumping Petition*, 46 Fed.Reg. 33,575 (June 30, 1981); *Toy Balloons and Playballs From Mexico; Dismissal of Coun- tervailing Duty Petition*, 46 Fed.Reg. 31,698 (June 17, 1981); *Glass-Lined Steel Storage Tanks, Pressure Vessels and Parts Thereof From France; Dismissal of Countervailing Duty Petition*

[4] *See Initiation of Antidumping Investigation / Dismissal of Antidumping Petitions Certain Steel Products From Romania*, 47

[5] *See Rescission of Initiation of Antidumping Duty Investi-gation and Dismissal of Petition: Certain Portable Electric Type-writers From Singapore*, 56 Fed.Reg. 49,880 (Oct. 2, 1991); *High Information Content Flat Panel Displays and Display Glass There- for From Japan: Final Determination; Rescission of Investigation and Partial Dismissal of Petition*, 56 Fed.Reg. 32,376 (July 16, 1991); *Hot-Rolled Carbon Steel Sheet From Belgium and the Federal Republic of Germany; Rescission of Notice Announcing Initiation of Antidumping Investigations and Dismissal of Petition*, 48 Fed.- Reg. 52,757 (Nov. 22, 1983); *Latchet Hook Kits From the United Kingdom; Dismissal of Antidumping Petition*, 45 Fed.Reg. 81,241 (Dec. 10, 1980).

an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations. The petition may be amended at such time, and upon such conditions, as the [ITA] and the [ITC] may permit.

* * *

**(3) Action with respect to petitions**

**(A) Notification of governments**

Upon receipt of a petition filed under paragraph (1), the [ITA] shall notify the government of any exporting country named in the petition by delivering a public version of the petition to an appropriate rep-resentative of such country.

**(B) Acceptance of communications**

The [ITA] shall not accept any unsolicited oral or written communication from any person other than an interested party described in section 1677(9)(C),(D),(E),(F), or (G) of this title before the [ITA] makes its decision whether to initiate an inves-tigation, except as provided in subsection (c)(4)(D) of this section, and except for inquiries regarding the status of the [ITA]'s consideration of the petition.

* * *

**(c) Petition determination**

**(1) In general**

**(A) Time for initial determination**

Except as provided in subparagraph (B), within 20 days after the date on which a pe-tition is filed under subsection (b) of this section, the [ITA] shall —

**(i)** after examining, on the basis of sources readily available to the [ITA], the accuracy and adequacy of the evidence provided in the petition, determine whether the petition alleges the elements necessary for the imposition of a duty under section 1673 of this title and contains information reasonably available to the petitioner supporting the allegations, and

**(ii)** determine if the petition has been filed by or on behalf of the industry.

**(B) Extension of time**

In any case in which the [ITA] is re- quired to poll or otherwise determine support for the petition by the industry under paragraph (4)(D), the [ITA] may, in exceptional circumstances, apply subparagraph (A) by sub- stituting "a maximum of 40 days" for "20 days".

* * *

**(2) Affirmative determinations**

If the determinations under clauses (i) and (ii) of paragraph (1)(A) are affirmative, the [ITA] shall initiate an investigation to determine whether the subject merchandise is being, or is likely to be, sold in the United States at less than its fair value.

**(3) Negative determinations**

If the determination under clause (i) or (ii) of paragraph (1)(A) is negative, the [ITA] shall dismiss the petition, terminate the proceeding, and notify the petitioner in writing of the reasons for the determination.

**(4) Determination of industry support**

**(A) General rule**

For purposes of this subsection, the [ITA] shall determine that the petition has been filed by or on behalf of the industry, if —

**(i)** the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and

**(ii)** the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

**(B) Certain positions disregarded**

**(i) Producers related to foreign producers**

In determining industry support under subparagraph (A), the [ITA] shall disregard the position of domestic producers who oppose the petition[] if such producers are related to foreign producers, as defined in section 1677(4)(B)(ii) of this title, unless such domestic producers demonstrate that their interests as domestic producers would be adversely affected by the imposition of an antidumping duty order.

**(ii) Producers who are importers**

The [ITA] may disregard the position of domestic producers of a domestic like product who are importers of the subject merchandise.

**(C) Special rule for regional industries**

If the petition alleges the industry is a regional industry, the [ITA] shall determine whether the petition has been filed by or on behalf of the industry by applying subparagraph (A) on the basis of production in the region.

**(D) Polling the industry**

If the petition does not establish support of domestic producers or workers accounting for more than 50 percent of the total production of the domestic like product, the [ITA] shall —

> **(i)** poll the industry or rely on other information in order to determine if there is support for the petition as required by subparagraph (A), or
>
> **(ii)** if there is a large number of producers in the industry, the [ITA] may determine industry support for the petition by using any statistically valid sampling method to poll the industry.
>
> **(E) Comments by interested parties**
>
> Before the [ITA] makes a determination with respect to initiating an investigation, any person who would qualify as an interested party under section 1677(9) of this title if an investigation were initiated, may submit comments or information on the issue of industry support. After the [ITA] makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be reconsidered.
>
> **(5) Definition of domestic producers or workers**
>
> For purposes of this subsection, the term "domestic producers or workers" means those interested parties who are eligible to file a petition under subsection (b)(1) of this section.

19 U.S.C. §1673a. Similar procedure exists for initiating a countervailing-duty investigation.[6]

As indicated above, the ITA, reacting within the strict timeframe adopted by Congress, found the petitioner SDO to be an interested party within the meaning of the statute, and it upheld "for initiation purposes"[7] the claimed existence of a regional industry. However, the Department of Commerce also reported that, pursuant to the

---

[6] *See* 19 U.S.C. §1671a. Of the elements of section 1673a set forth *in haec verba* in this opinion, a textual difference in section 1671a is its notification-of-governments subsection, to wit:

> Upon receipt of a petition filed under paragraph (1), the [ITA] shall —
>
> **(i)** notify the government of any exporting country named in the petition by delivering a public version of the petition to an appropriate representative of such country; and
>
> **(ii)** provide the government of any exporting country named in the petition that is a Sub- sidies Agreement country an opportunity for con-sultations with respect to the petition.

19 U.S.C. §1671a(b)(4)(A).

[7] 64 Fed.Reg. at 44,481, col. 1.

foregoing statutory authority, it invited representatives of the governments of México, Saudi Arabia and Venezuela for consultations with respect to the counter-vailing-duty petitions[8] it determined that refined products are not within the domestic like product for purposes of determining industry support for the petition[9]; it exercised its statutory discretion to extend the deadline for determining whether to initiate investigations "[b]ecause there was a question as to whether the petitioner met the statutory requirements concerning industry support"[10]; it sought to survey each of the 410 largest producers in the region, which accounted for over 86 percent of regional production, and a 401-company sample of the remaining producers there[11]; it received letters of opposition from a number of companies which accounted for approximately 50 percent of total regional production[12]; and it considered whether or not to disregard them, focusing on the opposing companies' attempt(s) to demonstrate that their interests as domestic producers would be affected adversely by the imposition of an antidumping or countervailing-duty order[13]. As for that focus,

---

[8] *See id.* at 44,480. If those invitation(s) issued pursuant to 19 U.S.C. §1671a(b)(4)(A)(ii), *supra*, it should be noted that Saudi Arabia (in contrast to the two other invitees) is not a "Subsidies Agreement country" within the meaning of that section, although it is the putative leader of the world cartel, the Organization of Petroleum Exporting Countries ("OPEC"), the *raison d'ëtre* of which is to control production and fix prices of crude oil. México, while not a formal member of OPEC, apparently attempts to follow its lead. *See, e.g.*, Ibrahim, *Oil Countries Approve World Cutback of 3%*, N.Y. Times, March 24, 1999, p. C1; Preston, *Mexico Playing Unfamiliar Role in World Oil Politics*, N.Y. Times, March 24, 1998, p. D2. Venezuela is a member of OPEC, as are Iraq and several other countries considered either unfriendly to or genuine enemies of the United States.

Be the lack of direct diplomatic relations with Iraq (and other hostile, oil-producing lands) as it is, nothing in the lan- guage of 19 U.S.C. §§ 1671a(b)(4)(A)(i) and 1673a(b)(3), *supra*, exempts the ITA from at least attempting to notify Baghdad of SDO's petition, via the embassy of Poland, which ostensibly represented U.S. interests there [*see, e.g.*, U.S. Dep't of State, *Iraq - Travel Warning* (Sept. 10, 1999)], or otherwise. *Cf.* 19 C.F.R. §351.202(i) (1999) (ITA "will invite the government of any exporting country named in the petition for consultations"). Indeed, notwithstanding Resolution 661, which was adopted by the Security Council of the United Nations on August 6, 1990 "to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait" and which, among other things, decreed that member states prevent the import of all commodities and products originating in Iraq, and also Executive Order No. 12,- 724 of the U.S. President *sub nom. Blocking Iraqi Government Property and Prohibiting Transactions With Iraq*, 55 Fed.Reg. 33,089 (Aug. 13, 1990), a report of the U.S. government itself discloses that 146,722,000 barrels of crude oil were imported from Iraq into this country during the period January - July 1999. *See* U.S. Energy Info. Admin., *Petroleum Supply Monthly*, p. 82 (Sept. 1999). By way of comparison, the Table 40 on that page shows imports from México, Saudi Arabia and Venezuela during that period to have been 272.540, 299.957 and 252.837 mil-lion barrels, respectively.

Whether the imports from Iraq were under the guise of the so-called "oil-for-food" program *viz.* Resolution 986 of the U.N. Security Council (April 14, 1995) and subsequent resolutions or not, the court has reviewed SDO's 235-page volume II of its petition, relating to alleged dumping in America of those millions of barrels of Iraqi oil, and also its 100-page volume VI, relating to claimed benefits bestowed upon such shipments by the government of Saddam Hussein. And the court must affirm that those averments, on their face, are not clearly frivolous.;

[9] *See* 64 Fed.Reg. at 44,481. The ITA also concluded that it did not need to decide definitively whether "lease condensates" are included within the domestic like product. *See id.*

[10] 64 Fed.Reg. at 44,481, col. 3.

[11] *See id.* at 44,481-82.

[12] *See id.* at 44,482. Notwithstanding the Department's man-date per 19 C.F.R. §351.303(b) (1999) that "all documents" in a matter such as this be addressed and submitted to the Secretary of Commerce, the court notes in passing that the chairman and chief executive officer of at least one major oil company ex-pressed "strong opposition" directly to the President of the United States, with copies of that written displeasure apparently also transmitted directly to the Vice President and the Sec-retaries of State, Treasury, and Energy, as well as Commerce, and to an Assistant to the President, a Deputy Secretary of the Treasury, an Acting Under Secretary of State, and an Assistant Secretary of Commerce. *See* R.Doc 196.

[13] 64 Fed.Reg. at 44,482.

the ITA reports specific resort to the API Ad Hoc Free Trade Committee

> because it is composed of the largest U.S. producers in opposition to the petitions and because its treat-ment is dispositive of the industry support issue.[14]

According to the agency's determination, the Committee argued

> that its opposition is not based on foreign interests or imports, but rather . . . on the fact that the Committee members' interests as domestic producers would be adversely affected by the imposition of antidumping or countervailing duties. [It] also argues that the petitioner has not alleged that each U.S. producer about which allegations were made is related to a foreign producer in each of the subject countries. Moreover, the petitioner has provided no basis for assuming that a relationship in one country would cause a producer to oppose a case against another country with potentially competing suppliers.
>
> Even assuming there are relationships, the Com-mittee argues, because the interest of domestic producers opposing the petition would be adversely affected by the imposition of an order, the Department must consider their views. . . . Finally, with respect to imports, the Committee argues that importing is a standard practice in the U.S. oil industry and that the large producers account for only a small portion of total imports. Moreover, . . . domestic producers which oppose the petition are not bound to imports from the subject countries. Therefore, the Committee argues, the Department should not disregard its opposition.

64 Fed.Reg. at 44,482, col. 2. The ITA accepted these composite arguments in rendering its decision that the petitioner SDO did not have support from more than 50 percent of the production in the region of the domestic like product produced by that portion of the industry expressing support for, or opposition to, the petition.[15]

B

Plaintiff's complaint pleads nine causes of action herein, which in essence allege (1) the ITA did not include in its calculation the production of a substantial number of domestic producers which support the

---

[14] *Id.*, col. 2. Those 16 firms, in alphabetical order, were listed as ARCO, BHP Petroleum, BP Amoco, Burlington Resources,
Chevron Corporation, Conoco Inc., Exxon Corporation, Fina, Inc., Kerr-McGee Corporation, Marathon Oil Corporation, Mobil Corpora-tion, Murphy Oil Corporation, Occidental Petroleum Corporation, Phillips Petroleum Company, Shell Oil Company, and Texaco Inc., which list included their crude-oil production figures (in thousands of barrels) for PADDs I-IV for 1997. *See* R.Doc 205.

Not only has the Ad Hoc Committee, itself, representing these firms, been granted leave to intervene in this case as a party defendant, BP Amoco, Chevron, Exxon, Mobil, Shell and Texaco have all intervened on their own accounts. Moreover, the court notes in passing that since then the Exxon and Mobil corporations have formally merged, as has BP Amoco PLC (itself a recent union of two erstwhile major oil companies) with ARCO, formerly known as Atlantic Richfield Company.

[15] 64 Fed.Reg. at 44,482. The agency eschewed addressing "a number of complex issues regarding the 25-percent test . . . because the 50-percent test has not been met." *Id.*, col. 3.

petition; (2) the agency attributed significant production by SDO-member Apache Corporation to ARCO rather than in support of the petition; (3) the ITA made no finding and did not recognize the views of the Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFL-CIO, CLC in support of the petition on behalf of production-related workers employed by a number of domestic oil producing firms; (4) the agency failed to neutralize the opposition of companies, the workers of which were in support of the petition; (5) the ITA relied on the general arguments of the API Ad Hoc Free Trade Committee, which was contrary to the statutory requirement that individual domestic producers in opposition to the petition prove that their particular interests would be adversely affected by the imposition of antidumping or countervailing duties; (6) the agency should have disregarded the op-position of those domestic producers which import crude petro-leum oil from one or more of the countries singled out in the petition; (7) the ITA did not allow associations to express support for SDO members unless those associations qualified themselves as interested parties; (8) in polling the domestic industry, the agency failed to include the support of the Independent Petroleum Association of America and its membership to the extent those members had not otherwise communicated their views; and (9) U.S. Secretary of Energy Richardson stated publicly that the government opposed the petition and that he would attempt to influence the process established by the Trade Agreements Act, *supra*.

The plaintiff has now interposed a motion for judgment upon the agency record pursuant to CIT Rule 56.2, and which is based upon the foregoing averments, save the claim of undue influence by the Secretary and/or the Department of Energy.[16] At a hearing held in open court on August 14, 2000, which was based upon initial review of the ITA record and written submissions on behalf of the parties in appearance, counsel for the defendant were invited to consider consenting to remand to the agency for reconsideration of the complex, competing positions. The defendant declined, and continues to decline, to do so. *See* Hearing Transcript ("Tr."), p. 23; Defendant's Response to the Court's Inquiry Concerning Remand, p. 2 ("the Government is not willing to consent to a remand").

---

[16] In filing its motion for judgment in March 2000, the plaintiff claimed that,

> [m]ore than six months ago, [it] properly submitted a FOIA request to the Department of Energy regarding the Secretary's involvement in the Commerce proceed-ing. This request has not been acted on, in contravention of the FOIA statute.

Plaintiff's Brief, p. 42. Whereupon it filed a motion for supplemental briefing following a hoped-for response to the afore-said request. That motion has been denied. *See Save Domestic Oil, Inc. v. United States*, 24 CIT __, Slip Op. 00-46 (April 26, 2000).

II

Hence, the court is obligated to decide the controversy engendered by the ITA's determination, which, in accordance with the statute, issued within a brief period of time[17]. Jurisdic-tion is pursuant to 19 U.S.C. §1516a(a)(1)(A) and 28 U.S.C. §§ 1581(c), 2631(c), 2632(c). The court's standard of review in a case like this is provided by section 2640(b) of Title 28 to be as specified in subsection (b) of section 1516a of Title 19, to wit:

**(1) Remedy**

The court shall hold unlawful any determination, finding, or conclusion found —

**(A)** in an action brought under subparagraph (A) . . . of subsection (a)(1) of this section, to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . ..

**(2) Record for review**

**(A) In general**

For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of —

> **(i)** a copy of all information presented to or obtained by the [ITA] . . . during the course of the administrative proceeding, in-cluding all governmental memoranda pertaining to the case and the record of ex parte meet-ings required to be kept by section 1677f(a)(3) of this title; and
>
> **(ii)** a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

**(B) Confidential or privileged material**

The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order. . . .[18]

---

[17] Indeed, the record reflects understandable concern about its shortness, given the scope and arguable complexity of this case. *See, e.g.*, R.Doc 39 *passim*; R.Doc 215, pp. 7-8; R.Doc 337, p. 3; Tr., pp. 5-6, 8, 11, 20-21, 41-42, 43. *See also* 64 Fed.-Reg. at 44,481; Defendant's Response in Opposition to Plaintiff's Motion for Judgment on the Agency Record ["Defendant's Brief"], pp. 7, 26, 71; Brief of Defendant-Intervenor API Ad Hoc Free Trade Comm., pp. 18, 47, 49 and 50, n. 193; Response Brief of Defendant-Intervenor Saudi Arabian Oil Company, p. 39, n. 39; Brief of Petroleos de Venezuela, S.A. and CITGO Petroleum Corp., pp. 10, 11; Brief of Defendant-Intervenor Petróleos Mexicanos *et al.*, pp. 18, 20, 22-23; Brief of Defendant-Intervenor BP Amoco Corp., pp. 7, 9.

[18] The court is constrained to confirm persistent difficulty in reviewing and thus reporting on the complete contents of the record as compiled by the agency, perhaps due to the scope and the complexity of SDO's eight country-specific petition volumes. The ITA's most-reliable indexing seems to be that for Venezuela, Inv. No. A-307-817, ergo the R.Doc numbers cited in this opinion come from that antidumping investigation file. Moreover, certain information which has now been received pursuant to CIT Rule 71-(b)(3) ["At any time, the court may order any part of the record retained by the agency to be filed"] is confidential and there-fore not subject to publication herein.

A

The crux of defendant's determination is that domestic U.S. producers which opposed SDO's petition demonstrated that their interests as such would be adversely affected by any imposition of antidumping and/or countervailing duties, whereupon their production of the domestic like product was counted against the petition. But according to the statute, 19 U.S.C. §§ 1671a-(c)(4)(B)(i), 1673a(c)(4)(B)(i), *supra*, such adverse counting has been prescribed by Congress only when domestic producers are related to foreign producers, as defined in 19 U.S.C. § 1677(4)(B)(ii), which provides:

> **(4) Industry** . . .
>
> **(B) Related parties**
>
> **(i)** If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry.
>
> **(ii)** For purposes of clause (i), a producer and an exporter or importer shall be considered to be related parties, if —
>
> **(I)** the producer directly or indirectly controls the exporter or importer,
>
> **(II)** the exporter or importer directly or indirectly controls the producer,
>
> **(III)** a third party directly or indirectly controls the producer and the exporter or importer, or
>
> **(IV)** the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than a nonrelated producer.
>
> For purposes of this subparagraph, a party shall be considered to directly or indirectly control another party if the party is legally or operationally in a position to exercise restraint or direction over the other party.

Obviously, the dispositive concept of this provision is *control*. While alluding to "serious questions about the sufficiency of the petitioner's allegations"[19] in this regard, the ITA nonetheless reached beyond those questions to decide the clearly contingent issue of whether the allegedly-foreign-related petition opponents "would be adversely affected" by any duties imposed herein. That approach did not follow the law on its face, nor was the approach even the more expedient, given the parties' presentations and the relatively few days in which to resolve the tandem elements of sections 1671a(c)(4)(B)(i) and 1673a(c)(4)(B)(i)

---

[19] 64 Fed.Reg. at 44,482, col. 1.

governing disregard of opposition by domestic producers related to foreign producers.

On its part, SDO did allege that 15 of the 16 members of the API Ad Hoc Committee are related to Petroleos de Venezuela, S.A., that nine of those member companies are also re-lated to the Mexican PEMEX enterprise(s), and that eight Committee companies are related to Saudi Aramco. *See, e.g.*, R.Docs 14, 198, 207-10, 226-30, 243, 244, 287, 288, 290. None of the 16 Committee members, however, was alleged to be related to Iraq's state-owned oil business, but SDO did assert that ten of them do import Iraqi crude, with nine companies alleged to import from México, ten from Saudi Arabia, and also ten from Venezuela. *See, e.g., id.*

With regard to Venezuela, the record does reflect business relationships between Committee companies and enterprises of that country[20], but it does not substantiate that those referred to by SDO entail the kind of control contemplated by section 1677(4)(B)(ii), *supra,* nor did the ITA even attempt to draw any conclusion to the contrary. The same is true with respect to México[21] and Saudi Arabia[22]. Unlike CITGO, Texaco Inc., for example, is not a subsidiary in the United States of Petróleos de Venezuela, S.A., nor is Petróleos Mexicanos a vassal in its home country of Kerr-McGee Corporation. In short, the failure to find controlling relationships between any of the four national exporters implicated by SDO's petition and any of the Committee companies made the agency resort to the secondary standard of 19 U.S.C. §§ 1671a(c)(4)(B)(i), 1673a(c)(4)(B)(i) inapposite and not in accord with the intent of Congress in enacting it in URAA.

---

[20] In fact, although not disclosed by the CIT Forms 13 re-garding corporate affiliations and financial interest filed in conjunction with the motion of Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation for leave to intervene as parties defendant herein, the latter firm is wholly-owned by the former. Neither is an Ad Hoc Committee member, however.

The types of relationships alleged by SDO to exist between Committee companies and Venezuelan enterprises are debt-financ-ing, designated-customer, joint-venture. *See, e.g.*, R.Docs 14, 198, 207, 208, 210, 227-30, 243, 244, 287, 288, 290.

[21] *See, e.g.*, R.Docs 14, 207, 209, 210, 226, 227, 229, 230, 244, 287, 290.

[22] Indeed, volumes IV and VIII of SDO's petition regarding this nation undermine any claim of control of or by Committee companies, and thus of any relationship within the purview of the statute quoted in the text. That is, each volume states at the outset:

> Oil exploration and production in Saudi Arabia began in the 1930s, when the Kingdom granted a concession to the Standard Oil Company of California (now Chevron). By the late 1940s, a joint venture of U.S. firms, including Exxon, Texaco, Chevron, and Mobil, created the Arabian American Oil Company, or Aramco.
>
> Saudi Arabia nationalized Aramco in 1976, giving the Saudi government full ownership of all hydrocarbon reserves and oil facilities in its territory. At first, Aramco remained an incorporated U.S. company and was operated on a fee basis by its four previous owners. However, in 1988 Aramco became the Saudi Arabian Oil Company (Saudi Aramco), a Saudi-registered, state-owned corporation, by Royal decree.

R.Doc 1, vol. IV, pp. 4-5; vol. VIII, p. 1 (footnotes omitted). Each describes the current standing of the government company under the Saudi Basic Law and its corporate statute. The description does not leave room for the concept of continuing western control, nor is there ground for accepting herein a claim of Saudi control over Exxon/Mobil, Texaco, Chevron, or other multinational producers of crude oil..

B

In general, the ITA has, and has had, discretion in interpreting and administering the Trade Agreements Act of 1979. And this Court of International Trade and its Court of Appeals for the Federal Circuit have afforded Commerce continuing deference in carrying out its difficult statutory responsibilities. *See, e.g., Nippon Steel Corp. v. United States*, 219 F.3d 1348 (Fed.Cir. 2000); *Mitsubishi Heavy Indus., Ltd. v. United States*, 24 CIT __, Slip Op. 00-97 (Aug. 8, 2000). Indeed, various sections of the Trade Agreements Act, as amended, directly reflect the intent of the legislature in this regard.

(1)

Sections 1671a(c)(4)(B)(ii), 1673a(c)(4)(B)(ii), *supra*, which are at issue herein, state that the ITA "may" disregard the position of domestic producers of a domestic like product who are importers of the subject merchandise. In this matter, the agency apparently determined to rely on its inapposite analysis under preceding subsections (c)(4)(B)(i) that the API Ad Hoc Committee companies, *en masse*, would be adversely affected by the imposition of any antidumping or countervailing-duty order and thus to not disregard their opposition to SDO's petition. But the application of subsections (c)(4)(B)(ii) is distinct from that of those preceding subsections and contingent upon the existing facts and circumstances precisely relevant thereto.

Here, the following 1997 domestic production figures (in thousands of barrels of crude oil) for the region represented by SDO were disclosed to the ITA by the Ad Hoc Committee counsel for the 16 members:

| | |
|---|---|
| ARCO | 63,592 |
| BHP Petroleum | 1,570 |
| BP Amoco | 81,395 |
| Burlington Resources | 24,600 |
| Chevron Corporation | 71,905 |
| Conoco Inc. | 21,320 |
| Exxon Corporation | 53,290 |
| Fina, Inc. | 3,806 |
| Kerr McGee Corporation | 8,760 |
| Marathon Oil Corporation | 38,350 |
| Mobil Corporation | 44,895 |
| Murphy Oil Corporation | 3,650 |
| Occidental Petroleum Corporation | 18,980 |
| Phillips Petroleum Company | 20,075 |
| Shell Oil Company | 100,010 |
| Texaco Inc. | 79,244 |

R.Doc 205. Obviously, the variance is almost one to one hundred (even without any accounting for the results of subsequent government acquiescence in the merger of Exxon and Mobil and now ARCO with BP Amoco). As for imports from the four national exporters singled out herein, SDO claims Committee companies imported

millions of barrels (in 1998) as follows:

| | |
|---|---|
| ARCO | 2,329,065 |
| BP Amoco | 69,744,565 |
| Chevron Corporation | 101,805,000 |
| Conoco Inc. | 55,530,735 |
| Exxon Corporation | 137,154,955 |
| Fina, Inc. | 38,652,040 |
| Marathon Oil Corporation | 88,400,000 |
| Mobil Corporation | 120,487,595 |
| Murphy Oil Corporation | 33,852,655 |
| Occidental Petroleum Corporation | 63,480,435 |
| Phillips Petroleum Company | 37,707,785 |
| Shell Oil Company | 133,330,485 |
| Texaco Inc. | 198,559,635 |

Whatever the precise figures for a particular firm and calendar year[23], the magnitude of U.S. crude oil imports from around the world, including Iraq, México, Saudi Arabia and Venezuela, is notorious. In fact, the imports from just those four countries exceeded, if not dwarfed, the above-listed domestic, regional numbers for every individual Committee company save ARCO/BP Amoco.[24]

This phenomenon indicates, of course, and the record supports, that the Committee companies have an interest in this case, but it by no means presages the ITA's determination not to disregard their opposition to SDO's petition. To begin with, the domestic, regional industry which SDO attempts to represent con-sists of more than 11,000 "independent", smaller-scale enterprises, a majority of whose oil wells and related workers have been at a standstill[25]. Their business, to the extent still viable, is hardly in the same league with the truly global pursuit and production of petroleum and its multiple, finished derivatives by the "integrated", multinational members of the API Ad Hoc Committee. To be sure, such economic disparity, however extraordinary, should not be automatically dispositive under the law governing a case like this, in particular where scale and complexity increase, which is the situation of Committee companies. While Fina, Inc.'s domestic production, for example, is but a fraction of the quantum of its imports, and ARCO's U.S. production exceeds its imports from all four target nations by some 60 million barrels, and the imports of Conoco, Murphy, Occidental and Phillips combined therefrom do not equal those of Texaco alone[26], the ITA not only acquiesced in the lumping of all those apparently-disparate competi-

---

[23] *See* R.Docs 198, p. 13; 207, p. 21; 208, p. 11; 210, p. 16; 226, p. 21; 227, p. 9; 229, p. 22; 230, p. 14; 243, p. 14; 244, p. 14; 287, p. 13; 290, p. 15; Plaintiff's Brief, pp. 11, 34. Import figures for these firms for 1997 can be derived from publicly-available data of the Energy Information Administration of the U.S. Department of Energy and are, in most cases, similar to the 1998 numbers.

[24] The record does not reflect imports from the countries in question on the part of BHP Petroleum, Burlington Resources, or Kerr-McGee Corporation.

[25] *Compare* R.Doc 215, p. 7 *with* Tr. at 44-45.

[26] *See* R.Docs 205, 226. *But see* Brief of Defendant-In-tervenor Texaco Inc., pp. 18-19.

tors together, it adopted their Committee's above-quoted, composite arguments as to how "members' interests as domestic producers would be adversely affected by the imposition of antidumping or countervailing duties." 64 Fed.Reg. at 44,482, col. 2. This lump-sum statement was embraced without any reported agency analysis of perceptible elements of any adverse effect due, for example, to political displeasure, real or feigned, on the part of the government of Iraq, México, Saudi Arabia or Venezuela; to duties of say 5 percent as opposed to fifty; to attempted redirection of exports by one or more of those governments; to decreased demand in the United States induced by the prospect of yet another American impost. *Cf.* R.Doc 334 *passim*. Moreover, within the realm of conflict of interest engendered by significant imports on the part of firms also producing in PADDs I-IV but opposing SDO, there was no ITA attempted differentiation between the levels and resultant percentages of those imports, the capacities of Committee companies to draw upon sources available elsewhere on Earth or in this country[27], or the degrees of competition among various members. *Ibid*. In fact, not all of those companies actually subscribed to the composite Committee claim that domestic prices would fall if any antidumping or countervailing duty really were to be imposed. *Compare id*. at 4 *with* R.Doc 82, p. 3 *and* R.Doc 293, third page. Yet, the agency took no final account of any difference of opinion.

When SDO then brought its complaint to this court, as noted above, the API Ad Hoc Free Trade Committee duly moved for leave to intervene as a party defendant, as did member companies BP Amoco, Chevron, Exxon, Mobil, Shell and Texaco, each on its own account. The Committee's motion was granted, but the court, upon reading the ITA's published determination to dismiss summarily SDO's petition, had no basis for determining how intervention of those members would not be redundant, whereupon their individual motions for leave to intervene were denied. *See Save Domestic Oil, Inc. v. United States*, 23 CIT _, Slip Op. 99-108 (Oct. 12, 1999). Each motion was renewed, gainsaying that the Ad Hoc Committee represented the members on anything more than "common interests", *e.g.*:

> . . . Exxon [] relied on the Committee to represent their *common* interests through the Committee's participation in the proceedings before the . . . ITC [] and the Department of Commerce . . ..
>
> But while the Committee represented its members' common interests, it did not represent its members on those issues as to which a member's particular facts or circumstances were involved.

---

[27] To quote, for example, from the Brief of Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation, pages 15-16, in this regard:

> . . . [T]he major U.S. oil companies were not wedded to the "allegedly dumped imports." They simply had too many alternatives. As the experts explained, crude oil is a worldwide . . . commodity that is produced around the world and sold at prices dictated by the world mar- kets. As the report of the Petroleum Industry Research Foundation indicated, "replacement supplies appear to be readily available." Thus, the major U.S. oil com-panies did not need to import crude oil from the four countries named in the petitions; they could obtain the oil from a variety of other sources at the same prices.

> In this regard, Exxon itself participated actively in the administrative proceeding below, and opposed the initiation of an investigation. Toward that end, it submitted Exxon-specific questionnaire responses to both the ITC and the Commerce Department, responded to allegations that pertained solely to Exxon . . . and provided additional Exxon-specific data where it was called for . . ..

Amended Consent Motion of Exxon Corporation to Intervene, pp. 2- 3 (emphasis in original). The renewed motions to intervene were thereupon granted, confirming the Committee's inability to represent its members' individual interests.

(2)

As set forth above, the provision in the Trade Agreements Act for disregard of the position of domestic producers of a domestic like product which are importers of the subject merchandise was expanded by the Uruguay Round Agreements Act. And the record indicates that this case is the first in which the ITA declined to disregard importer opposition. *Cf.* Defendant's Brief, pp. 60-67; Tr., pp. 10-11. The Statement of Administrative Action, which issued in conjunction with the URAA enhancement and carries "particular authority"[28], explains:

> Amended sections 702(c)(4)(B)(ii) and 732(c)- (4)(B)(ii) also provide that, as under current practice, Commerce will not apply a bright line test to determine whether a producer who is an importer of the subject merchandise or who is related to an importer of the subject merchandise should be excluded from the domestic industry. Instead, it will look to relevant factors, such as percentage of ownership or volume of imports. For example, the exclusion of a company that imports a small amount of subject merchandise, by comparison with its total production, will depend on whether that company and petitioners have a common stake in the investigation. *See Citro-suco Paulista, S.A. v. United States*, 704 F.Supp. 1075, 1085 (Ct. Int'l Trade 1988).

H.R. Doc. No. 103-316, vol. I, pp. 858-59 (1994). In the case cited with approval, which arose well before adoption of URAA and involved imports of frozen concentrated orange juice from Brazil, the court affirmed the ITA's reliance on 19 U.S.C. § 1677(4)(B), *supra*, to exclude producers from the "domestic in-dustry" that derived a majority of their product from the imports under investigation, that is, in excess of 50 percent. In other words, the agency had taken the position

> that firms with large imports of the allegedly dumped or subsidized merchandise may be excluded from the definition of the domestic industry, because they in-herently lack the stake in the final investigation being pursued by the petitioner.

12 CIT at 1206, 704 F.Supp. at 1085.

---

[28] H.R. Doc. No. 103-316, vol. I, p. 656 (1994).

The parties agree herein that, since enactment of URAA, three other proceedings encumbered the ITA with the issue at bar, two earlier and one subsequent to the determination to dismiss SDO's petition. *See Ball Bearings and Parts Thereof From Thailand; Final Results of Changed Circumstances Countervailing Duty Review and Revocation of Countervailing Duty Order*, 61 Fed.Reg. 20,799, 20,801 (May 8, 1996) ("Objecting Parties cannot be said to have a common 'stake' with the petitioner"); *Initiation of Antidumping Duty Investigations: Live Cattle from Canada and Mexico*, 63 Fed.Reg. 71,886 (Dec. 30, 1998) (opposition to pe-tition by importer from México of some 10-15 percent of its stock requirements disregarded); *Initiation of Antidumping In-vestigation: Citric Acid and Sodium Citrate From the People's Republic of China*, 65 Fed.Reg. 1,588, 1,589 (Jan. 11, 2000)("The Department has disregarded Proctor & Gamble, Inc.'s opposition because . . . they are a major purchaser and user of domestic and imported citric acid and sodium citrate").

This is the first case to have the issue considered anew in court. On its part, the plaintiff takes the position that those three matters reflect "consistent prior practice" and "established precedents"[29], amounting to "traditional practice"[30], and that the ITA had a duty to explain its departure from such prior norm. Plaintiff's Reply Brief, p. 11, citing *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). The defendant properly recognizes its duty in this regard but also that it "is not obligated to adhere to the same policies over time." Defendant's Brief, p. 62. Accordingly, the ITA did not follow *Citrosuco* "because the peculiarities of the oil industry did not warrant application of the same test." *Id.* at 63. That is, the agency

> found that the facts present in the oil industry required the agency to consider factors other than the level of imports. Specifically, Commerce noted that "oil is a limited, non-renewable natural resource" and that "current U.S. demand cannot be sat-isfied solely by increasing domestic production; it can be satisfied only through a substantial level of imports." "[W]hen fairly and sympathetically read in the context of the entire opinion of the agency" (*Atchison*, 412 U.S. at 809), these distinctions reveal that Commerce exercised its discretion in the *Dismissal Determination* in a manner consistent with congressional intent.

*Id.* at 63-64 (footnote omitted).

---

[29] Plaintiff's Reply Brief, p. 11.

[30] *Id.* at 15.

While the world of petroleum may well be *sui generis*, this alone does not necessarily confirm that the ITA's approach was consistent with congressional intent. For example, the government's own public data demonstrate that proved domestic reserves were almost four times even last year's gross U.S. consumption.[31] Moreover, domestic production in PADDs I-IV during 1999 nearly equalled the 1,545,866,000 barrels of crude oil imported from Iraq, México, Saudi Arabia and Venezuela and, in fact, exceeded the 1,412,161,000 barrels imported from all other countries. Included in that group is the largest single exporter to the United States, Canada, not an OPEC member. Nevertheless, the government quotes with approval the proposi-tion of the Petroleum Industry Research Foundation, Inc. ("PIRINC") that affirmative relief for SDO in this case "would 'undermine the unity and effectiveness of OPEC, and non-OPEC producers by adding incremental supply to the market' which would, in turn, lead to lower prices." Defendant's Brief, p. 53, quoting R.Doc 269, Exhibit E, p. 3.

Whatever the geological and concomitant political realities, Congress and Commerce both have referred to a "common stake" in the economics underlying a given administrative proceeding as the dispositive test. And whether an importer passes that test in order to have its opposition to a petition for imposition of antidumping or countervailing duties counted necessarily entails ITA consideration of that firm's level of imports and resultant dependency thereon. For the agency not to have administered its test on an individual basis was an abuse of its discretion. As counsel for the API Ad Hoc Committee, itself, argued to the ITA, "expressions of support by oil industry associations are non-probative in these cases". R.Doc 321, p. 5.

C

That argument was directed at associations which sought to support SDO's petition, one of which was the Independent Petroleum Association of America ("IPAA"). It asserted that a "majority of its members engage in the exploration and production of the domestic like product"[32] and therefore that it qualified as an "interested party" under the statute. Responding to an ITA questionnaire, IPAA claimed such status on the ground that a majority of its members have offices in PADDs I-IV but that it was unable to provide production figures for them within that region. *See* R.Doc 148, QR p. 2. Whereupon, the ITA declined to grant IPAA standing. *See* R.Doc 336, pp. 3-4.

The Trade Agreements Act definition of an "interested party" is, in pertinent part, as follows:

---

[31] *See* U.S. Energy Info. Admin., *U.S. Crude Oil, Natural Gas, and Gas Liquids Reserves - 1998 Annual Report*, pp. 19-26 (1998). *Cf.* M.A. Adelman, The Genie out of the Bottle, p. xxii (1995)("World oil shortage is a fiction, but belief in this fic-tion is a fact"); Thomas Gold, The Deep Hot Biosphere (1999).

[32] R.Doc 336, p. 1.

> **(C)** a manufacturer, producer, or wholesaler in the United States of a domestic like product,
>
> **(D)** a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,
>
> **(E)** a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,
>
> **(F)** an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), (E) with respect to a domestic like product . . ..

19 U.S.C. §1677(9). In tying such status to a domestic like product, clearly Congress intended to provide in a case such as this for associations like IPAA. *See, e.g.*, S.Rep. No. 96-249, p. 90 (1979). And the ITA did not proceed otherwise[33], witness its seemingly-spontaneous embrace[34] of the API Ad Hoc Committee. Rather, the agency properly required IPAA to prove the necessary connection to the regional domestic like product. While IPAA initially was unable to obtain the requisite information, it may still be able to establish on remand that its members are regional producers.

(1)

In enacting URAA, Congress also clearly indicated its intent that "labor have equal voice with management in supporting or opposing the initiation of an investigation." H.R. Rep. No. 103-826, pt. 1, p. 48 (1994).

> If workers are represented by a union, Commerce will count the production of those firms whose workers are represented by the union as being for or against the petition in accordance with the workers' position. If the management of a firm expresses a position in direct opposition to the views of the workers in that firm, Commerce will treat the production of that firm as representing neither support for nor opposition to the petition.

*Id.* A regulation of the Department, 19 C.F.R. § 351.203(e)(5) (1999), provides that, in conducting a poll of an industry, the ITA "will include unions, groups of workers, and trade or business associations."

Here, the record reflects an attempt by the agency, pursuant to 19 U.S.C. §§ 1671a(c)(4)(D), 1673a(c)(4)(D), *supra*, to poll each of the 410 largest producers in PADDs I-IV, which account for over 86 percent of the production therein, and 401 of the remaining producers in the region. *See* 64 Fed.Reg. at 44,481-82. The ITA reports receipt of

---

[33] *See id.* at 2-3.

[34] *Cf.* Letter from Robert J. Heilferty, Esq. to the Court (Aug. 31, 2000).

responses from 41 percent of the "companies" comprising the first group and from 18 percent of the sampled 401 "companies". *Id.* at 44,482, col. 1. There is no indication that the agency, contrary to its own regulation and the intent of the governing statute, made any attempt to poll production workers at those particular firms, nor did it otherwise determine where labor stands *vis-à-vis* SDO's petition. *See* R.Doc 215, pp. 8-9; R.Doc 331, p. 2.

The U.S. Department of Labor reports that the petroleum industry experienced a sharp decline in domestic exploration and production and an extended period of downsizing and restructuring, losing almost 390,000 jobs from 1982 to 1995, as contrasted with some 339,000 still existent wage and salary jobs in 1998. U.S. Dep't of Labor Bulletin 2523, *Career Guide to Industries 2000-01 Edition*, p. 34 (Jan. 2000). Moreover, that Department projects an additional, overall 17 percent decline through the year 2008. *Cf. id.* at 35. As for the positions found still active, the Bureau of Labor Statistics reports about 60 percent in 1999 were in just four states, three of which, Louisiana, Oklahoma and Texas, are within the ITA's designated region [*id.* at 34]; more than seven out of ten establishments employ fewer than ten workers, although more than half of all workers in the industry are employed in settings of 50 or more [*id.*]; and

> [f]ew industry workers belong to unions. In fact, only about 4 percent of workers were union members or covered by union contracts in 1998 . . ..

*Id.* at 36.

Be that last statistic as it is, the Paper, Allied-Industrial, Chemical & Energy Workers International Union, AFLCIO, CLC ("PACE") came forward with an expression of support for SDO, whereupon it was served with an ITA questionnaire "to as-certain whether the union qualifies as an interested party and, if so, how to account for its support." R.Doc 337, p. 1. PACE claimed support emanating from members in the employ of ten com-panies. The ITA disregarded the pipeline workers at four of those firms because they "are involved solely in transporting crude oil" and thus are not "engaged in the production of crude oil (*i.e.*, operating the wells)." *Id.* at 3. That nuance apparently does not exist with respect to the other six companies, but the agency also took no account of their production workers' indicated support of SDO on the ground that their chosen union representative failed to provide requested information, *viz.*:

> . . . [W]ithout production data for the specific facilities at which PACE represents workers engaged in the production of crude oil, we have no way of accounting for its support.

*Id.*

The plaintiff complains that the ITA should have accounted for the workers' support at all ten firms. It argues that the managements of those companies are possessed of the production data requested by the agency and that their workers "should not have been penalized

simply because the data w[ere] wholly in management[] hands." Plaintiff's Reply Brief, pp. 19-20. It claims that, since the agency decided to conduct a poll of the industry, it was arbitrary and capricious to have done so without

> eliciting information about worker support for the petition or . . . determining the production of crude oil by those companies whose workers supported the petition.

*Id.* at 20. And the plaintiff also argues that pipeline workers are an integral part of the production of petroleum and that the production of the four firms where PACE members work should therefore have been taken into account by the ITA.

Indeed, it is hard to imagine meaningful "production" of the liquid raw material that is crude petroleum oil without its passage through pipe, often arrayed in lines for miles, whether near or in the Persian Gulf, the Gulf of México, or anywhere else, yet the court notes that the workers who man those pipelines are not necessarily classified by the government with their brethren who engage in "oil and gas extraction". *Compare, e.g.*, Executive Office of the President, Office of Mgmt. & Budg-et, North American Industry Classification System - United States 1997, pp. 67-68 (1998) *with id.* at 478-79. This is not to state that, had the ITA counted PACE's members at the four domestic companies involved in transporting crude oil as properly aligned in support of SDO's petition, such approach would have violated the Trade Agreements Act, as amended, *supra*. On the other hand, given that statute and the clear intent of Congress in enacting URAA, this court concludes that it was not in accordance with law for the agency to have failed to account at all for the views of labor in this case.

(2)

Under the statute as set forth above, standing is tied to a domestic like product, which Congress has defined to mean

> a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation[,]

19 U.S.C. §1677(10), and which the ITA determined to define here- in as "crude petroleum oils and oils obtained from bituminous minerals testing at, above, or below 25 degrees A.P.I." 64 Fed.Reg. at 44,480, col. 3. In doing so, the agency confirmed that the class or kind of merchandise to be investigated "norm-ally will be . . . as defined in the petition"[35] and also confirmed that it followed that practice herein, thereby rejecting attempts by interested parties to have refined products and "lease condensates" also considered the domestic like product. *Id.* at 44,481, cols. 2-3. The inclusion of either could have an impact on this case, given the support for, and nature of the opposi-

[35] 64 Fed.Reg. at 44,481, col. 2.

tion to, SDO's petition.

With regard to refined products, there is little on the record to support the proponents of inclusion. Indeed, the plaintiff argues that refining needs and expectations, much of them offshore, are what genuinely motivate the Ad Hoc Committee companies in opposition to its petition, not their domestic pro-duction of the raw material SDO's members capture.[36]

Be that part of the ITA's determination as it is, Com-mittee companies also urged the inclusion of "lease condensates", which position engendered the following reported discussion:

> The issue of whether "lease condensates" are included properly within the domestic like product is more complicated. Lease condensates consist es- sentially of a mixture of certain hydrocarbon com-pounds that, in terms of weight and complexity, fall between natural gas and crude oil. They are liquids formed from natural gas as a result of temperature or pressure changes. Often lease condensates are mixed with crude oil and the resulting mixture is sold to a refinery as crude oil.
>
> The petitioner argues that the Department should not include lease condensates in the domestic like product because the mixture of hydrocarbon compounds in lease condensates is different from the mixture of hydrocarbon compounds in crude oils. Consequently, it asserts, lease condensates can only be refined into a limited range of products. Opposing the petitioner's position, other parties have argued that lease condensates are very similar in physical characteristics and uses to light crude oil and that, when mixed, they simply become an indistinguishable part of the crude-oil stream which is sent to the refinery.
>
> In addition to the extremely complex technical nature of the issue, ascertaining the precise nature of available production and distribution data as well as attempting to establish the appropriate analytical framework for a very diverse industry has been proble-matic for the Department. However, it is not necessary to decide this issue because . . . we have determined that the petitioner does not have the requisite industry support, regardless of how the issue of lease con-densates is resolved.

---

[36] *Compare* Plaintiff's Brief, pp. 28-30 *with* R.Doc 82, p. 9 ("If Chevron's access to foreign crude at competitively set mar-ket prices is restricted, the cost of operating our U.S. refineries that cannot run domestic crudes efficiently will increase") *and* R.Doc 180, p. 5 ("Shell is vitally concerned with events — such as the extraordinary import duties sought by the petition-er[] in these proceedings — that threaten . . . to deprive Shell's refining operations of access to essential crude oil sup- plies") *and* Confidential Record Document ("ConfDoc") 49, p. 2 ("the imposition of additional tariffs or countervailing duties would have the potential of negatively impacting domestic refiners, Phillips . . .") *and* ConfDoc 79, p. 61 ("These duties would increase Mobil's supply and production costs for gasoline, avia-tion fuel, lubricants and other petroleum products and petro-chemicals in the United States").

*Id.* Given that this case must be remanded for reconsideration by the agency, decision of this issue may become necessary. For example, if, as SDO contends, lease condensates are not found in its members' domestic product, but prove to be part of the product obtained domestically by Committee companies, then that part may have to be discounted in the opposition of those pro-ducers to the petition.

III

Perhaps, the "extremely complex technical nature" of the lease-condensates issue was exacerbated by the limited time afforded the ITA by the statute. But expeditious, generally- affirmative initial action, has been the mandate of Congress since 1979. That is, the intent of the Trade Agreements Act has been that the agency

> act upon all petitions which, based upon facts reason-ably available to petitioner, make reasonable allegations of the presence of the elements necessary for the imposition of a . . . duty . . .. Consequently, the Committee expects that the [ITA] will act upon most petitions, rejecting only those which are clear- ly frivolous, not reasonably supported by the facts alleged or which omit important facts which are rea-sonably available to the petitioner.

H.R. Rep. No. 96-317, p. 51 (1979). And this expectation of Con- gress has been realized almost one thousand one hundred times since then, with only one petition having been summarily rejected over the past 20 years on reasoning remotely similar to that herein, and notwithstanding subsequent judicial appreciation of the ITA's limited time for rendering a determination. *E.g.*, *Fu-jitsu Ltd. v. United States*, 23 CIT __, __, 36 F.Supp.2d 394, 401 (1999), and cases cited therein.

Of course, the fact that at least preliminary ITA (and ITC) investigation ensues in the "vast majority of cases", to quote from the reported URAA contemplation of Congress regarding initial agency time to consider petitions upon filing, H.R. Rep. No. 103-826, pt. 1, p. 49 (1994), does not necessarily lead to any affirmative final antidumping or countervailing-duty relief. And this court is neither at liberty nor able to project the out- come(s) of any agency investigation(s) in this case, which may genuinely entail phenomena beyond the hale of the 1979 Act. Suffice it to state at this stage, however, that the ITA's dismissal of SDO's petition, as described and discussed above, was not in accordance with law. Ergo, plaintiff's motion for judgment upon the agency record developed to date must be, and it hereby is, granted.

This case is hereby remanded to Commerce for contemplation of commencement of a preliminary investigation by its ITA (and referral for such an investigation by the ITC) in accordance with law, as set forth hereinabove. The defendant may have 60 days from the date hereof for this purpose. To the extent, in the exercise of its sound discretion during that time, the agency determines to reconsider its analysis of any of the threshold issues raised by the petition, includ-

ing the nature of SDO's domestic product *vis-à-vis* that of other domestic producers and support for, and opposition to, the petition on the part of do-mestic producers and workers, the ITA may call upon the interested parties to supplement the record, and also upon the U.S Departments of Labor and of Energy for relevant, publicly-available data not yet part of the record. If the stated opposition of the API Ad Hoc Free Trade Committee is still sought to be taken into account, the agency is hereby directed to consider the facts and circumstances of the business of each Committee company, standing on its own, including most necessarily that particular company's imports of crude petroleum oil from Iraq, México, Saudi Arabia or Venezuela.

If the result of this remand is not initiation of pre-liminary investigation(s) by the ITA (and the ITC), the written reasons therefor are to be filed with the court on or before the close of the aforesaid 60-day period, whereupon the parties here-to may have 30 days to serve and file comments thereon, with any replies thereto due within 15 days thereafter.

So ordered.

---

## NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

(Slip Op. 00-121)

PRECISIONS SPECIALTY METALS, INC., PLAINTIFF, *v.* UNITED STATES OF AMERICA, DEFENDANT.

Court No.: 98-02-00291

[Defendant's motion for reconsideration GRANTED in part and DENIED in part. Plaintiff's motion for summary judgment DENIED.]

Decided: September 20, 2000

*Collier Shannon Scott PLLC*, Washington, DC (*Laurence J. Lasoff, Robin H. Gilbert, John M. Herrmann*); *Howrey, Simon, Arnold & White*, Washington, DC (*Jeffrey W. Brennan*), for Plaintiff.

*David W. Ogden*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office; *Mikki Graves Walser*, Commercial Litigation Branch, Civil Division, Department of Justice, New York, New York; *Chi S. Choy*, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs Service, New York, New York, of counsel, for Defendant.

## OPINION

### I.

### PRELIMINARY STATEMENT

WALLACH, *Judge:* This case comes before the court on Defendant's Motion for Reconsideration and/or Relief From the Court's Order Dated May 24, 2000 (the "Reconsideration Motion"), and on Plaintiff's Motion for Summary Judgment Pursuant to United States Court of International Trade Rule 56 ("Plaintiff's Motion for Summary Judgment").

The Order dated May 24, 2000 struck Defendant's Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, and the related papers filed therewith, as untimely filed, and granted summary judgment in favor of Plaintiff as Plaintiff's Motion for Summary Judgment was thus unopposed. In the Reconsideration Motion, Defendant asks the court to accept its late-filed submissions on summary judgment. In the alternative, Defendant urges the court to make an independent analysis of the merits of Plaintiff's Motion for Summary Judgment. For the reasons set forth below, the court grants the Reconsideration Motion to the extent that it seeks an independent analysis by the court of Plaintiff's Motion for Summary Judgment. The court denies the remainder of the Reconsideration Motion.

In its Motion for Summary Judgment, Plaintiff Precision Specialty Metals, Inc. ("Precision") contests Customs' denial of drawback on certain entries of stainless steel trim[1] and scrap. Customs based its denial on a determination that the subject merchandise is "waste" or "valuable waste", and thus is not an "article manufactured or produced" within the meaning of the drawback statute, 19 U.S.C. § 1313(b) (1994). Plaintiff contends that, as a matter of fact and of law, the merchandise at issue is not waste, and that Plaintiff is entitled to drawback thereon. Because the court concludes that Plaintiff has failed to meet its burden on summary judgment to demonstrate the absence of any genuine issue of material fact, Plaintiff's Motion for Summary Judgment is denied.

## II.

## BACKGROUND

### A. *Facts*

This case involves 38 claims for substitution manufacturing drawback made pursuant to 19 U.S.C. § 1313(b), the manufacturing substitution drawback statute, and Treasury Decision ("T.D.") 81-74. T.D. 81-74 is a general drawback contract for articles manufactured using steel, and provides, in pertinent part, for the allowance of drawback on imported "[s]teel of one general class, e.g. an ingot", where the "merchandise . . . which will be used in the manufacture of the ex-

---

[1] Plaintiff has failed to provide the court with evidence as to the precise nature of the merchandise as to which drawback was denied, and the record is ambiguous on this point. In its brief, Plaintiff asserts that

> two types of non-prime material . . . are at issue in this litigation. . . . "[S]econdary material" . . . consists of stainless steel sheet and strip that due to surface or other minor defects is not suitable for the same uses as the "prime" product. . . . By far, the majority of PSM's drawback claims at issue involve stainless steel scrap [which] . . . is material that cannot be used in applications similar to prime product, but rather is suitable only for use as remelting stock for further production of stainless steel products and is sold at a price lower than secondary material.

Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment ("Plaintiff's Brief") at 7-8, n.3 (record citation omitted). In its letter to Customs expressing its intention to adhere to the terms of the drawback contract, Plaintiff sought drawback on "stainless steel coils, sheets and trim". Appendix Accompanying the Memorandum of Law In Support of Plaintiff's Motion for Summary Judgment ("App.") A-1 (Letter from Precision to Customs declaring intention to adhere to terms of T.D. 81-74, dated October 23, 1991) at 1. Customs, in its denial of drawback in connection with the entries at issue, described the merchandise at issue as "scrap". App. A-20 at 1. Plaintiff's protest forms do not identify the nature of the merchandise at issue. In its Memorandum in Support of Protest and Application for Further Review, Plaintiff does not specifically describe the merchandise. It repeatedly refers to the merchandise at issue as "trim", apparently to bolster an argument (abandoned here) that the merchandise at issue falls precisely within the wording of the drawback contract approved by Customs, which included "trim". Plaintiff stated, in its unrefuted statement pursuant to USCIT Rule 56(i), that documents (which have not been placed before the court) submitted in connection with the merchandise at issue described the merchandise as "stainless steel", "stainless steel scrap", "metal scrap", "scrap steel for remelting purposes only", "steel scrap sabot", and "desperdicio de acero inoxidable". Plaintiff's Brief, Annex Pursuant to U.S. CIT R. 56(i) ("Rule 56(i) Statement"), at ¶ 18. Also in that statement, Plaintiff repeatedly states that the merchandise at issue is "stainless steel scrap". *Id.* at ¶¶ 18-24.

Plaintiff has not provided evidence as to whether the merchandise in fact consisted of all or some of these, nor has it provided sufficient evidence regarding the distinctive characteristics and uses of these various items – distinctions which, as noted below, may require varying results for varying goods. Evidence submitted by Plaintiff tends to indicate that scrap and trim differ in ways that are material to the determination of this action. *See* App. A-21 (Affidavit of Robert E. Heaton, sworn to on September 5, 1996) at 3, ¶ 5 ("The differences in nomenclature [between sheet, coils, trim, or scrap] largely reflect the differences in end use of the residual material within the steel consuming community."); App. G (Transcript of Deposition of Robert E. Heaton taken January 20, 2000) at 43 ("[P]rime stainless steel [is] what you ordered . . . . [I]f I cut off trim . . . which is too narrow or some size reason that it can't be sold as secondary as a market, then it will become scrap. . . . The intermediate position is secondary where there are the strip that we trim off or a sheet we trim off a coil, whatever it is, trim, strip or sheet . . . ."). Trim apparently has a market for use other than as scrap, as does "secondary". This ambiguity presents an issue which requires elucidation at trial.

ported products" is "[s]teel of the same general class, specification and grade as the [subject imported] steel[.]" The steel used in the manufacture of the exported products on which drawback is sought must be "used to manufacture new and different articles, having distinctive names, characters and uses." T.D. 81-74 further provides that "no drawback is payable on any waste which results from the manufacturing operation."

On October 23, 1991, Precision submitted a letter to Customs expressing its intention to adhere to and comply with the terms of T.D. 81-74. *See* App. A-1. In that letter, Precision described the various steel products on which it would claim drawback. Those products included "stainless steel coils, sheets and trim" of various chemistries identified by industry standards. *Id.* at 1. Customs granted Precision's request to claim drawback under T.D. 81-74.[2] App. A-4 (Letter from Customs to Precision, dated January 10, 1991 [sic — 1992]).

Precision filed 116 drawback entries under T.D. 81-74 between December 11, 1991 and May 13, 1996. Rule 56(i) Statement, ¶ 5. Customs liquidated 69 of these entries with full benefit of drawback, in which Precision had claimed exports of stainless steel trim, stainless steel strip, stainless steel scrap and stainless steel coils, for a total of approximately $850,000. Id. at
¶ 6. Over that period, Customs routinely requested clarifying information concerning Precision's drawback entries. Id. at ¶ 7. Prior to January 1996, Customs never questioned the eligibility of that merchandise for drawback. Id. at ¶ 7.

Documentation submitted in connection with the remaining entries, which contained the merchandise at issue, described the merchandise by various terms such as "stainless steel," "metal scrap," "scrap steel for remelting purposes only," "steel scrap sabot," "stainless steel scrap," and "desperdicio de acero inoxidable[3]." Id. at ¶ 18. *See* App. B at 2.

During 1992 and 1993, when conducting "pre-liquidation reviews" of three drawback claims that involved exports of "[s]tainless [s]teel coil ends and side trim (scrap)", Customs asked Precision for additional information and documentation on the exports involved. App. A-8 (Letter from Customs to Pat Revoir dated July 10, 1992); App. A-11 (Letter from Gary Appel to Customs dated July 22, 1992). In response, Precision furnished Customs with additional information and documentation, showing that the exported material was stainless steel scrap. Customs liquidated each of those three drawback entries for

---

[2] On July 26, 1993, Precision notified Customs of a change in the terms of its authority to operate under T.D. 81-74 concerning the names of officers of the company who would sign drawback documents on the company's behalf. App. A-5 (Letter from Precision to Customs, dated July 26, 1993). Customs approved this amendment by letter of September 7, 1993 without prejudice to any existing drawback claims on file. App. A-6 (Letter from Customs to Precision, dated September 7, 1993).

[3] Customs translated this term as "stainless steel waste". App. B (Customs HQ Ruling 227373, dated Oct. 10, 1997) at 2. Plaintiff has not submitted any evidence to contradict this translation.

the full amount of drawback claimed. *See* App. A-14 (Notice of Liquidation); Rule 56(i) Statement, ¶¶ 8-10.

In January 1996, Customs first questioned the eligibility of Precision's claims involving stainless steel trim for drawback. *See* Rule 56(i) Statement, ¶ 7; App. A-7 (January 10, 1996 notice from Customs to Appel-Revoir). In June 1996, Precision received a Notice of Action informing it that 38 of its drawback entries were being liquidated without the benefit of drawback in full or part, on the basis that "scrap was shown on the export bill(s) of lading" and that "[d]rawback is not available upon exports of valuable waste."[4] App. A-20. The entries at issue were liquidated on June 14, 1996. Rule 56(i) Statement, ¶ 14.

B. *Procedural History*

On September 10, 1996, Precision filed a timely protest covering the entries at issue in this matter. *See* Rule 56(i) Statement, ¶ 15. Customs denied Precision's protest. Id., ¶ 16. Precision thereafter timely commenced this action by filing a summons on February 5, 1998. Precision filed its complaint on October 21, 1998.

On July 26, 1999, the court issued a scheduling order, setting the close of discovery for December 31, 1999. On January 4, 2000, the court granted the parties' consent motion for an extension of the discovery cutoff, and extended the cutoff to February 29, 2000.

At a status conference held March 2, 2000, Defendant stated that it had not yet completed its discovery efforts (which commenced shortly before the already-extended discovery cutoff date), and indicated that it wished to seek the court's permission to conduct further discovery. That day, the court issued a scheduling order (the "March 2 Order"), setting a March 9, 2000 deadline for Defendant to file any motion for limited additional discovery. This order also set a deadline of April 3, 2000 for Plaintiff to file a motion for summary judgment. Defendant was given 30 days in which to file any opposition and/or cross-motion to plaintiff's summary judgment motion. Plaintiff was given 10 days in which to file any reply brief. Trial was set for June 19, 2000, in the event that all issues were not resolved on summary judgment. On March 14, 2000, the court issued an order modifying the March 2 Order. This March 14 order granted Plaintiff 30 days in which to file reply papers in the event the Defendant filed a cross-motion, and provided that trial would be rescheduled if a cross-motion were filed.

---

[4] When required to state the "complete factual basis supporting the U.S. Customs Service's determination that entries filed by or on behalf of the Plaintiff claiming drawback on the merchandise at issue are not eligible for drawback", Customs responded that "[t]he merchandise in issue is either waste or valuable waste. Neither waste nor valuable waste are manufactured or produced. Accordingly, the exportation of the merchandise in issue is not eligible for drawback." *See* App. C (Plaintiff's First Set of Interrogatories and First Request for Production of Documents (Interrogatory No. 15) and Defendant's Responses thereto (response to Interrogatory No. 15)).

On April 11, 2000, the court issued an order partially granting Defendant's motion for additional discovery, and providing that Defendant was to complete any such discovery no later than April 25, 2000.

Plaintiff filed its Motion for Summary Judgment on March 31, 2000.[5] Thus, by the terms of the March 2 Order, Defendant was required to file any opposition and/or cross-motion papers no later than May 5, 2000.

On May 4, 2000, at 5:51 p.m., Defendant filed Defendant's Motion to Extend the Time Within Which to File Its Response to Plaintiff's Motion for Summary Judgment ("Defendant's Motion for Extension"), seeking a thirty-day extension of time in which to file its opposition to Plaintiff's Motion for Summary Judgment. Defendant's Motion for Extension, and the supporting papers, contained no request for an extension of time for Defendant to file a cross-motion for summary judgment.

On May 10, 2000, the court issued an order denying Defendant's Motion for Extension and requiring Defendant to file any opposition to Plaintiff's Motion for Summary Judgment "forthwith".

On May 19, 2000 (two weeks after the date on which Defendant's opposition papers should have been filed), Plaintiff filed Plaintiff's Motion for Establishment of a Hearing Schedule, If Necessary, on Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion for Hearing Schedule"). In this motion, Plaintiff urged that briefing on its Motion for Summary Judgment should be held to be closed, in light of the fact that Defendant had yet to file any papers opposing summary judgment. Also on May 19, 2000, the court issued an order scheduling an in-court status conference.

On May 22, 2000, at 5:24 p.m. — the night before the conference set for Plaintiff's Motion for Hearing Schedule — Defendant filed its Opposition to Plaintiff's Motion for Summary Judgment and Cross-Motion for Summary Judgment, Defendant's Statement of Material Facts As To Which There Is No Genuine Issue To Be Tried, Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and In Support of Defendant's Cross-Motion for Summary Judgment, and Defendant's Response to Plaintiff's Annex Pursuant to U.S. CIT Rule 56(i) (collectively, "Defendant's Opposition Papers").

On May 23, 2000, the court held an in-court status conference. During that conference, the court heard argument regarding Plaintiff's Motion for Hearing Schedule, including that part of the motion that asked the court to close briefing on Plaintiff's Motion for Summary Judgment. On May 24, 2000, the court issued an order (the "May 24 Order") striking Defendant's Opposition Papers from the record, granting Plaintiff's Motion for Summary Judgment as unopposed, directing Plaintiff's counsel to file proposed findings of fact and conclusions

---

[5] The papers were actually filed on April 6, 2000, but were deemed filed as of March 31, 2000.

of law and a proposed form of judgment, and canceling the trial previously scheduled for June 20, 2000.

On June 2, 2000, Defendant filed the instant Reconsideration Motion, seeking reconsideration and/or relief from those portions of the May 24 Order that (1) struck Defendant's Opposition Papers as untimely filed, and (2) granted Plaintiff's Motion for Summary Judgment as unopposed.

On June 16, 2000, the court issued an order which, in pertinent part, denied the Reconsideration Motion insofar as it sought reconsideration of that part of the May 24 Order which struck Defendant's Cross-Motion for Summary Judgment as untimely filed. As noted in the June 16 Order, that part of the Reconsideration Motion is baseless. By order dated March 2, 2000, Defendant was required to file any cross-motion no later than May 5, 2000. Defendant's Motion for Extension, and the supporting papers, contained no request for an extension of time for Defendant to file a cross-motion. Defendant never moved for an extension of time in which to file a cross-motion for summary judgment, and there was no decision on that issue to be reconsidered. The June 16 Order thus limited oral argument to the remaining aspects of the Reconsideration Motion. The issues embraced therein are discussed below, and are followed by a discussion of Plaintiff's Motion for Summary Judgment.

## III.

### Analysis of Defendant's Reconsideration Motion

#### A. *Defendant's Opposition Papers Were Untimely Filed*

Defendant asks the court to reconsider that part of the May 24 Order that struck Defendant's Opposition Papers.[6] As grounds for reconsideration, Defendant urges that the term "forthwith", as used in the May 10 Order denying Defendant's Motion for Extension, was ambiguous, and asserts that the May 22, 2000 filing of Defendant's Opposition Papers was timely under a reasonable interpretation of the May 10 Order. The factual basis for this argument is unsupported by the record; its legal premise is without sufficient authority to persuade this court that it has merit.

Defendant filed its Opposition Papers seventeen days after the date those papers were due under the March 2 Order, and twelve days after the court denied Defendant's Extension of Time Motion. Defen-

---

[6] As used in the discussion below, the term "Defendant's Opposition Papers" does not include the aspects of those papers that cross-move for summary judgment. As previously noted, Reconsideration Motion was denied as to Defendant's Cross-Motion, by Order dated June 16, 2000.

dant thus effectively granted itself a seventeen-day extension, although the court denied its request for a thirty-day extension. Defendant contends that its belated filing fell within a reasonable interpretation of the definition of "forthwith".[7]

Defendant cites *Black's Law Dictionary*, which defines "forthwith" as:

> Immediately; without delay; directly; within a reasonable time under the circumstances of the case; promptly and with reasonable dispatch. U.S. ex rel. Carter v. Jennings, D.C.Pa., 333 F.Supp. 1392, 1397. Within such time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed or accomplished. The first opportunity offered.

*Black's Law Dictionary* 654 (Sixth Ed. 1990). Defendant also cites judicial constructions of the term. Many of these examine the use of "forthwith" in the context of the Suits in Admiralty Act ("SAA"), 46 U.S.C. § 742 (1988), which requires service on the United States Attorney "forthwith". In that context, *Libby v. United States*, 840 F.2d 818, 821 (11th Cir. 1988), defines the term to require action with "reasonable promptness, diligence or dispatch" (quoting *U.S. v. Bradley*, 428 F.2d 1013, 1015-16 (5th Cir. 1970)), and notes that "in assessing the reasonableness of the speed with which one acts it is essential to consider the act which one is performing." Justice Thomas, in dissenting to the Supreme Court's holding in *Henderson v. United States*, 517 U.S. 654 (1996), observed that "[a]lthough we have never undertaken to define 'forthwith' as it is used in the SAA, it is clear that the term 'connotes action which is immediate, without delay, prompt, and with reasonable dispatch.'" *Id.*, 517 U.S. at 680 (citations omitted).

Defendant noted that the Second Circuit stated in *City of New York v. McAllister Bros., Inc.*, 278 F.2d 708 (2d Cir. 1960), that "'[f]orthwith' means immediately, without delay, or as soon as the object may be accomplished by reasonable exertion." *Id.*, 278 F.2d at 710. Defendant omitted, however, the following sentence which the court finds particularly instructive: "The Supreme Court has said of the word that '*in matters of practice* and pleading *it is usually construed*, and sometimes defined by rule of court, *as within twenty-four hours.*' *Dickerman v. Northern Trust Co.*, 1900, 176 U.S. 181, 193 . . . ." *Id.* (emphasis added).

---

[7] Defendant claimed at oral argument that its counsel was unsure of the meaning of the word "forthwith" and therefore consulted *Black's Law Dictionary* and several case authorities. Such action fails to meet this court's expectations of a minimum practice standard. If counsel has been ordered to perform an act, in an order which includes a word subject to reasonable definition as requiring immediate action, counsel is well advised to either perform that act immediately or to seek clarification from the court. What counsel cannot safely do is choose the definition which best suits its convenience, and rest on its own decision.

The common thread running through the case law and the definition quoted from *Black's* is a paramount emphasis on immediacy, under the attendant circumstances. Indeed, Defendant's counsel indicated at oral argument that she understood the term "forthwith" to mean "immediately":

> I understand and appreciate that "forthwith" means immediately, I do appreciate that, and that is why so much of my time was dedicated to preparing our cross motion, what "forthwith" means though, in terms of days, I didn't know.[8]

Transcript of oral argument at Status Conference on May 23, 2000, at 14.

Further resort to *Black's Law Dictionary* reveals the following definition of the word "immediately", which is the first word appearing in the Defendant's definitions of the word "forthwith":

> Without interval of time, without delay, straightway, or without any delay or lapse of time. Drumbar v. Jeddo-Highland Coal Co., 155 Pa. Super. 57, 37 A.2d 25, 27. When used in contract is usually construed to mean "within a reasonable time having due regard to the nature of the circumstances of the case", although strictly, it means "not deferred by any period of time". Integrated, Inc. v. Alec Fergusson Elec. Contractors, 250 C.A.2d 287, 58 Cal.Rptr. 503, 508, 509. *The words "immediately" and "forthwith" have generally the same meaning. They are stronger than the expression "within a reasonable time" and imply prompt, vigorous action without any delay.* Alsam Holding Co. v. Consolidated Taxpayers' Mut. Ins. Co., 4 N.Y.S.2d 498, 505, 167 Misc. 732.

*Black's Law Dictionary* 750 (Sixth Ed. 1990) (emphasis added).

A delay of seventeen days in performing an act for which the court had rejected an extension of thirty days is outside the meaning of the term forthwith in the context of the court's May 10 Order. Defendant's Opposition Papers were not filed "immediately". Indeed, the seventeen-day delay does not even demonstrate "reasonable dispatch", particularly in light of the court's denial of the requested extension. For this reason, Defendant's Reconsideration Motion is denied insofar as it seeks to have the court accept its late-filed Opposition Papers. The court now turns to the remaining aspect of the Reconsideration Motion.

### B. *Plaintiff's Motion For Summary Judgment Should Be Assessed On Its Merits*

Defendant argues that, even if the court declines to accept its late-filed Opposition Papers, the court must assess the merits of Plaintiff's

---

[8] The court notes that any such uncertainty could have been resolved immediately through a request by counsel for clarification.

Summary Judgment Motion prior to granting summary judgment. Plaintiff concedes the point.[9]

"Summary judgment is warranted when, based upon the 'pleadings, depositions, answers to interrogatories, . . . admissions on file, . . . [and] affidavits, if any,' the court concludes that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." *Peg Bandage, Inc. v. United States*, 17 CIT 1337, 1339 (1993) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)). Under this standard, the court *must* reach a conclusion that there is no factual issue and that the applicable laws warrant judgment in favor of the movant; absent such a conclusion, there can be no summary judgment. This rule is underscored by the wording of USCIT Rule 56(e), which provides, in pertinent part, that where a motion for summary judgment is unopposed, "summary judgment, *if appropriate*, shall be entered against the adverse party." *Id.* (emphasis added). Plainly, summary judgment may not be entered if it is not "appropriate", and that determination is a function of the court.

On a motion for summary judgment, the movant bears the burden of demonstrating[10] that there is no genuine issue of material fact. *United States v. F. H. Henderson, Inc.*, 10 CIT 758, 760 (1986) (citing *SRI Int'l v. Matsushita Electric Corp. of America*, 775 F.2d 1107, 1116 (Fed. Cir. 1985)). If that burden is not met, there can be no grant of summary judgment. The courts are also under an obligation to view the evidence in a light most favorable to the nonmovant, and to draw all reasonable inferences in its favor. *Id.* This obligation does not depend on the presence of opposition papers from the nonmovant.

These well-recognized standards demonstrate that lack of opposition is not, standing alone, a sufficient basis for granting a summary judgment motion. The court's order of May 24, 2000, was thus to that extent in error, and accordingly, the court grants that portion of Defendant's Reconsideration Motion which asks the court to independently review Plaintiff's Motion for Summary Judgment. The following portion of this Opinion constitutes that review.

---

[9] "USCIT R. 56(e) indicates that, prior to entering a final judgment in favor of the plaintiff, the Court must determine that Precision Specialty Metals' submissions in support of its Motion for Summary Judgment entitle it to relief." Plaintiff's Opposition to Defendant's Motion for Reconsideration and/or Relief From the Court's Order Dated May 24, 2000, at 3.

[10] USCIT Rule 56(h) requires the summary judgment movant to "annex[] to the motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried." The party opposing summary judgment must then file "a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." *Id.* "All material facts set forth in the statement required to be served by the[] moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party." *Id. See United States v. Continental Seafoods, Inc.*, 11 CIT 768, 773-74, 672 F. Supp. 1481, 1486-87 (1987); *United States v. Menard, Inc.*, 16 CIT 410, 414, 795 F. Supp. 1182, 1185-86 (1992). Plaintiff's factual assertions in its 56(i) statement are thus admitted for the purpose of this summary judgment motion and do not require full substantiation in the record.

## IV.

### ANALYSIS OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

A. *Standard of Review*

The court subjects this unopposed motion for summary judgment to the usual standard on summary judgment, outlined above. In doing so, the court reviews Customs' denial of Plaintiff's protest *de novo*. *See Rheem Metalurgica S/A v. United States*, 20 CIT 1450, 1456, 951 F. Supp. 241, 246 (1996), *aff'd* 160 F.3d 1357 (Fed. Cir. 1998). Although the decision of the Customs Service is presumed correct and "[t]he burden of proving otherwise shall rest upon the party challenging such decision," the court's role in reviewing the decision is to reach the correct result. 28 U.S.C. § 2639(a)(1) (1994); *see also Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir.1984). The court will therefore consider this matter *de novo* to reach the proper result. Thus, the court will sustain Customs' decision if it is proper, even if the rationale is not articulated in Customs' decision.

Customs' decision on Plaintiff's protest relies in part on its regulations enacted to implement the provisions of the drawback statute. If that statute is clear on its face, the court must follow Congressional intent, regardless of the existence of an interpretation by Customs to the contrary. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the statute is ambiguous, an agency interpretation embodied in the implementing regulations is entitled to deference, as is an agency interpretation arrived at following a formal adjudication. *Id.*, 467 U.S. at 843-44; *Christensen v. Harris County*, __ U.S. __, 120 S. Ct. 1655, 1662 (2000). Such deference is only warranted, however, if the agency's interpretation is based on a permissible construction of the statute, in light of the language, policies and legislative history of the statute. *See Chevron*, 467 U.S. at 843; *Corning Glass Works v. United States*, 799 F.2d 1559, 1565 (Fed. Cir. 1986). To the extent that Customs' regulation is ambiguous, deference to Customs' interpretation of that regulation is entitled to deference as well. *Christensen*, 120 S. Ct. at 1662; *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

B. *Plaintiff Has Failed to Demonstrate That Steel Scrap is Subject to Drawback*

Plaintiff claims drawback under 19 U.S.C. § 1313(b), which provides that:

> (b) Substitution for drawback purposes
>
> If imported duty_paid merchandise and any other **merchandise** (whether imported or domestic) of the same kind and quality are **used in the manufacture or production of articles** within a period not to exceed three years from the receipt of such imported merchandise by the manufacturer or producer of such articles, **there shall be allowed upon the exportation**, or destruction under customs supervision, **of any such articles**, not-

> withstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, **an amount of drawback** equal to that which would have been allowable had the merchandise used therein been imported . . . . (emphasis added).

A manufacturer seeking to avail itself of the drawback privilege must comply with applicable rules and regulations. *See* 19 U.S.C. § 1313(l); 19 C.F.R. § 191.23(d) (1996); 19 C.F.R. § 191.45 (1996). Among other things, the regulations provide that "each manufacturer . . . shall apply for a specific drawback contract by submitting a drawback proposal." 19 C.F.R. § 191.21(a) (1996). This is not a question of whether a party has satisfied a commercial contract; this case presents a claim for "exemption from duty, a statutory privilege due only when enumerated conditions are met." *Guess? Inc. v. United States*, 944 F.2d 855, 858 (Fed. Cir. 1991). "'Such a claim is within the general principle that exemptions must be strictly construed, and that doubt must be resolved against the one asserting the exemption.'" *Id.* (quoting *United States v. Allen*, 163 U.S. 499, 504 (1896)).

1. *Customs' Decision*

Customs determined that the stainless steel scrap at issue is "valuable waste" under the terms of the drawback contract, and thus not an article that is manufactured or produced within the meaning of § 1313(b). App. B at 5. Customs cited 19 C.F.R. § 191.22(a)(2) (1996), which provides that "[i]n liquidating the drawback entry, the quantity of imported duty-paid merchandise or drawback products used will be reduced by an amount equal to the quantity of merchandise the value of the waste would replace." App. B at 3; *see also* 19 C.F.R. § 191.32(b) (1996). Indeed, as Customs noted, since 1936 it has expressly required exclusion of the value of valuable waste from the amount of drawback. *See* App. B at 3.[11]

Customs also cited C.S.D. 80-137, *Drawback: Whether Drawback is Allowable on Valuable Waste Incurred in Manufacture*, 14 Cust. B. & Dec. 941 (Oct. 22, 1979). *Id.* That decision involved a manufacturer's application for drawback on the exportation of a valuable waste byproduct which resulted from the manufacture of steel rolled coils. Customs noted that drawback is allowable on exports of byproducts, but not on exports of valuable wastes. *Id.* at 941. Customs distinguished wastes, which result from "a 'process of segregation or elimi-

---

[11] Plaintiff attacks Customs' reference to its longstanding policy of excluding waste from drawback computation. Specifically, Plaintiff disputes Customs' reliance on *United States v. Dean Linseed-Oil Co.*, 87 F. 453, 456 (2d Cir. 1898), *National Lead Co. v. United States*, 252 U.S. 140, 144-45 (1920) and *Seeberger v. Castro*, 153 U.S. 32, 35 (1894). *See* Plaintiff's Brief at 26-27. Plaintiff argues, correctly, that none of these cases rests its holding on the issue of whether drawback is payable on the exportation of waste. *See id.* These cases do, however, reference the historical distinction between waste and manufactured articles, in the drawback context and otherwise. Moreover, that historical distinction in the drawback context is amply reflected in other decisions, some of which are detailed below.

nation,'" from byproducts, which are produced by a "'process of manufacture or other means.'" *Id.* at 942 (quoting *Burgess Battery Co. v. United States*, 13 Cust. Ct. 37 (1944)). Customs ultimately ruled that "the waste is the residue from steel slabs used to manufacture something else (rolled coils) rather than an article manufactured." *Id.*

Plaintiff claims that Customs erred in its determination and argues that, as a factual matter and as a matter of industry terminology, stainless steel scrap is not "waste", but is an article manufactured or produced within the meaning of §1313(b). Plaintiff cites to numerous items in the record before the court which support the conclusion that stainless steel scrap is created during the same manufacturing process that produces Plaintiff's primary products. The court accepts this undisputed evidence as established fact for the purpose of the instant motion. Nevertheless, Plaintiff has failed to provide the court with a legal definition of any of the governing statutory and regulatory terms, nor has Plaintiff advanced any legal basis upon which the court can conclude that the industry understanding of the terms at issue should govern. Plaintiff has not cited any judicial or administrative definition of the terms "manufactured", "produced" or "waste" in a general context, in the drawback context, or in the context of the steel industry.

The court is thus called upon to determine whether stainless steel scrap is an "article" "manufactured" or "produced" within the meaning of § 1313(b). The court must also construe the meaning of the term "valuable waste" for purposes of the related regulations and T.D. 81-74.

When a word is undefined in a statute, the agency and the reviewing court normally give the undefined term its ordinary meaning. *See Perrin v. United States*, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Brookside Veneers, Ltd. v. United States*, 847 F.2d 786, 789 (Fed. Cir. 1988).

Review of these sources, and judicial and administrative interpretations of the terms at issue, reveals a venerable distinction between waste and "manufactured" or "produced" articles, particularly in the tariff context.

2. *Definitions of the Terms at Issue*

The court first looks to dictionary definitions as indicators of the common and popular meaning of the terms at issue. Webster's Third New International Dictionary (1986) (hereinafter "Webster's Dictionary") defines the term "article", in pertinent part, as "**5 :** a material thing **:** ITEM, OBJECT <~*s* of diet> <scarce ~*s* command high prices>." Webster's Dictionary 123. "[I]n a tariff sense, the term 'articles' is

sufficiently comprehensive to include . . . 'almost every separate substance or material, whether as a member of a class, or as a particular substance or commodity,' except where the Congress has indicated that the term shall have a narrower signification." *Lussky, White & Coolidge, Inc. v. United States*, 21 CCPA 201, 202 (1933) (quoting *Junge v. Hedden*, 146 U.S. 233, 238 (1892)); *see also United States v. Eimer & Amend*, 28 CCPA 10 (1940) (providing a review of other decisions analyzing the use of the term "article" in the tariff statutes).

The court must determine whether Congress has indicated a narrower signification by the use of the terms "manufactured" or "produced," which would distinguish "waste" from such "articles". Webster's Dictionary offers the following pertinent definitions of the term "manufactured":

> [1]**manufacture** . . . **1 :** something made from raw materials by hand or by machinery < hemp and tow cloth were familiar household ~*s* –V.S. Clark >
> < imports most ~*s* used by consumers or needed for internal development –D.L. Cohn > **2a :** the process or operation of making wares or other material products by hand or by machinery esp. when carried on systematically with division of labor < families engaged in domestic ~ often lived and worked in one room –J.W. Krutch > < the ~ of furniture > < steel ~>
>
> * * *
>
> [2]**manufacture** . . . **1 :** to make (as raw material) into a product suitable for use <the wood . . . is *manufactured* into fine cabinetwork –*Amer. Guide Series: Oregon* > < ~ iron into steel> **2a :** to make from raw materials by hand or by machinery

Webster's Dictionary at 1378. Not surprisingly, Webster's definition of the term "produce" bears a close resemblance to that of "manufacture":

> **8a :** to give being, form, or shape to **:** make often from raw materials : MANUFACTURE < *produced* 5,002 cars in three years –*Amer. Guide Series: Mich.* > **b** to make economically valuable **:** make or create so as to be available for satisfaction of human wants **9 :** to cause to accrue **:** bring in as profit < money at interest ~*s* an income ~ *vi* **:** to bring forth a product or production **:** bear, make, or yield that which is according to nature or intention **:** grow, make, or furnish economically valuable products < labored literally day and night to ~ –Vera M. Dean >

*Id.* at 1810. "Waste" has been extensively defined in Webster's Dictionary, which offers the following pertinent definition:

> **4a:** damaged, defective, or superfluous material produced during or left over from a manufacturing process or industrial operation; material not usable for the ordinary or main purpose of manufacture**:** as **(1)** material rejected during a textile manufacturing process and either recovered for reworking (as yarn) or used usu. for wiping dirt and oil from hands and machinery (2) **:** SCRAP

*Id.* at 2580.

The courts, and the Customs Service, have had numerous occasions to construe these terms, in varying tariff contexts[12]. "Manufacture implies a change, but every change is not manufacture, and yet every change in an article is the result of treatment, labor, and manipulation. But something more is necessary . . . . There must be transformation; a new and different article must emerge, having a distinctive name, character, or use." *Anheuser-Busch Brewing Assoc. v. United States*, 207 U.S. 556, 562 (1908) (citations and punctuation omitted) (holding that certain corks for bottling beer did not qualify for drawback because they had not been "manufactured" within the United States; "A cork put through the claimant's process is still a cork."). This seminal definition has been applied not only in the drawback context but in numerous other areas of tariff law. The term "produced" was a later addition to the drawback statute. Some courts have concluded that the added term must represent an attempt to extend the availability of drawback; otherwise, the new term would be mere surplusage, a result the courts have consistently abhorred. *See United States v. Int'l Paint Co., Inc.*, 35 CCPA 87, 91-92 (1948) (reviewing legislative history); *Rolland Freres, Inc. v. United States*, 23 CCPA 81, 86 (1935) ("We are inclined to agree . . . that Congress, by the use of the new language in connection with the word 'produced', intended to authorize drawback on certain articles which had not been 'manufactured' as that term was sometimes technically defined."). Nevertheless, the courts have not been "disposed to give the provision such a construction as would warrant the allowance of drawback upon every article which had been brought into this country and subsequently exported, merely because some manufacturing effort had been expended thereon." *Rolland Freres*, 23 CCPA at 86. Later decisions have incorporated the question of whether an article is "produced" into the original test of "manufacture".

In the wake of *Anheuser-Busch*, subsequent decisions have shown the difficulty of "tak[ing] concepts applicable to products such as textiles and apply[ing] them to combinations of liquids or fabrication of steel articles." *Superior Wire v. United States*, 11 CIT 608, 615, 669 F. Supp. 472, 479 (1987), *aff'd*, 867 F.2d 1409 (Fed. Cir. 1989). "[C]ourts have been reluctant to lay down specific definitions in this area of the

---

[12] The opinion in *National Juice Products Assoc. v. United States*, 10 CIT 48, 58 n.14, 628 F. Supp. 978, 988 n.14 (1986) reviews the similarity between the "article manufactured or produced" drawback analysis and the analysis required by two other statutory programs. *See also Tropicana Products, Inc. v. United States*, 16 CIT 155, 159, 789 F. Supp. 1154, 1157 (1992) (noting parallel analyses under the several programs, but underscoring need for mindfulness of the differing underlying statutory purposes in applying the standards). To qualify for duty free treatment under the Generalized System of Preferences, an article must be "[s]ubstantially transformed in the beneficiary developing country into a new and different article of commerce." 19 C.F.R. § 10.177(a)(2) (1996); *see Torrington Co. v. United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985). Country-of-origin marking requirements under 19 U.S.C. § 1304 (1994) depend on whether the manufacturer subjects imported merchandise to a "substantial transformation . . . even though the process may not result in a new or different article," subsequent to entry into the United States. 19 C.F.R. 134.1(d)(1) (1996). In light of the relative paucity of precedent on the meaning of these terms under § 1313(b), and the similarity of the analysis under the three statutory schemes, the court will rely in part on interpretations of the subject terms under all three statutory schemes, recognizing that differences in the underlying statutory language and purposes may in some instances preclude reliance on the latter.

law other than to discuss the particular facts of cases under the particular tariff provisions involved." *Belcrest Linens v. United States*, 741 F.2d 1368, 1372 (Fed. Cir. 1984).

Application of the *Anheuser-Busch* definition thus has evolved into a highly flexible "name, character or use" test, also known as the "substantial transformation" test, which looks to whether the article in question has been subjected to a process which results in the article having a name, character or use different from that of the imported article. *See, e.g., Int'l Paint*, 35 CCPA at 93-94; *Nat'l Juice Products*, 10 CIT at 58, 628 F. Supp. at 988. A "substantial transformation of the original materials may be found where there is a definite and distinct point at which the identifying characteristics of the starting materials is [sic] lost and an identifiable new and different product can be ascertained. A transitional stage of a material in process, advancing toward a finished product, however, may not be sufficient." *F.F. Zuniga v. United States*, 996 F.2d 1203, 1206 (Fed. Cir. 1993) (citation omitted). In applying the "name, character or use" test, courts have focused primarily on changes in use or character of the item,[13] turning to various subsidiary tests depending on the situation. *Superior Wire*, 11 CIT at 614-15, 669 F. Supp. at 478 (listing decisions adopting such subsidiary tests); *see also Int'l Paint*, 35 CCPA at 94 (exported merchandise underwent a change of character when the processes at issue fitted the goods for a distinctive use for which the imported merchandise had been wholly unfit).[14]

A review of the decisions applying this test to merchandise with similar characteristics to Precision's merchandise highlights these subsidiary criteria. In *Superior Wire*, the court considered whether hot-rolled steel wire rod was "substantially transformed" when it was subjected to a cold-drawing process which yielded steel wire. In that process, the rod was drawn through one, two, or sometimes three dies. 11 CIT at 609, 669 F. Supp. at 474. The resulting product was substantially stronger, cleaner, smoother, less springy, less ductile, and cross-sectionally more uniform. *Id.* Evidence reflected that the cost of setting up such a facility was relatively low. 11 CIT at 610-11, 669 F. Supp. at 475. The process added approximately 15% in value to the product. *Id.* at 611, 669 F. Supp. at 475. The uses for which the product was suitable did not narrow. *Id.* at 617, 669 F. Supp. at

---

[13] Although the test is typically framed in the disjunctive, the "name" criterion has repeatedly been held not dispositive. A change in the name of the product is the weakest evidence of a substantial transformation. *See Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983) (fact that imported product was called an "upper" and final product a "shoe" did not affect the court's finding of no substantial transformation); *Int'l Paint.*, 35 CCPA at 93-94 ("Under some circumstances a change in name would be wholly unimportant and equally so is a lack of change in name under circumstances such as [in this drawback case.]").

[14] *Superior Wire* also identified certain other tests for use in this field. Review of the body of cases in the drawback and related contexts do not find widespread use of those tests, which are thus not detailed here. *See, e.g., Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 473-74, 664 F. Supp. 535, 538 (1987) (rejecting essence test as not grounded in precedent); *CPC Int'l, Inc. v. United States*, 21 CIT 784, 794, 971 F.2d 574, 583 (1997) (*rev'd on other grounds*, 165 F.3d 1371 (1999)) ("the court finds that the essence test is embraced by and aids in applying the traditional changed of name, character or use test").

480. The goods did not change from "producers' goods" to "consumers' goods". *Id.* Based on these findings, the court determined that there had been no significant change in the use or character of the imported merchandise.

In *Ferrostaal Metals Corp. v. United States*, 11 CIT 470, 664 F. Supp. 535 (1987), the court considered the country of origin of certain steel sheet which had been annealed and galvanized in New Zealand by a process known as "continuous hot-dip galvanizing" using full hard cold-rolled steel sheet from Japan. The court considered whether the galvanizing and annealing process resulted in a "substantial transformation" of the merchandise. "Although the process affects the distribution of carbon and nitrogen in the [steel] sheet, annealing does not change the actual chemical composition and dimensions of the sheet." 11 CIT at 475, 664 F. Supp. at 539. The galvanizing process, which was accomplished by dipping the sheet in molten zinc, was "an irreversible process which provides electrochemical protection to the sheet." *Id.* The court found that the annealing process added a strength and ductility which "significantly affects the character by dedicating the sheet to uses compatible with the strength and ductility of the steel. A change in the end uses of products . . . is itself indicative of a change in the character of the product." *Id.* at 476, 664 F. Supp. at 540. The court also found that "the hot-dip galvanizing process is substantial in terms of the value it adds to full hard cold-rolled steel sheet. The evidence showed that the Japanese product is sold for approximately $350 per ton, while the hot-dipped galvanized product is sold for an average price of $550 to $630 per ton." *Id.* at 477, 664 F. Supp. at 540. "Testimony at trial overwhelmingly demonstrated that cold-rolled steel is not interchangeable with steel of the type imported, nor are there any significant uses of cold-rolled sheet in place of annealed sheet." *Id.* "Such a change in the utility of the product is indicative of a substantial transformation." *Id.* at 477, 664 F. Supp. at 541. The court also found that a change in the name of the product, and of its tariff classification, further supported its conclusion that the product had undergone a "substantial transformation". *Id.* at 478, 664 F. Supp. at 541.

Against the yardstick of the "substantial transformation" test, the court turns to the issue of whether "waste" or "valuable waste" is properly included within the ambit of articles which have been manufactured or produced. Plaintiff contends that there is no basis in law for this distinction, as it appears in 19 C.F.R. §191.22(a)(2), in T.D. 81-74, and in Customs' ruling on Plaintiff's protest. Plaintiff's Brief at 25 ("While Congress has seen fit to limit drawback in certain respects (*see* 19 U.S.C. § 1313(w)), it has not limited drawback with respect to stainless steel scrap, nor for that purpose scrap metal generally — or even waste. It is a well-settled canon of statutory construction that exceptions are not to be implied, nor can an exception be created by construction."). As detailed below, the court concludes that Customs' regulation carving out "waste" from drawback eligibility has emerged

not as an "exception" to the drawback statute, but in recognition of the fact that "waste" is not, as a matter of definition, an article "manufactured or produced", as is necessary to trigger the privileges conferred by § 1313(b).

Numerous decisions have discussed this distinction. Two of these have been cited with particular frequency in this context.

In *Patton v. United States*, 159 U.S. 500 (1895), the Supreme Court considered whether certain "wool tops" (wool which had been put through several processes in preparation for spinning) which had been intentionally broken in order to obtain a lower rate of duty in export, was properly classified as "woolen waste".[15] The Court noted testimony in the record "tending to show that in England merchantable tops, broken up for the purpose of exportation, had acquired the commercial designation of waste, or, more properly, 'broken top waste.'" *Id.* at 505. The Court considered whether the imported goods were in fact "waste" for tariff purposes, noting that

> The prominent characteristic running through all the[] definitions is that of refuse, or material that is **not susceptible of being used for the ordinary purposes of manufacture**. It does not presuppose that the article is absolutely worthless, but that it is unmerchantable, and used for purposes for which merchantable material of the same class is unsuitable.

*Id.* at 503 (emphasis added). The Court also considered the related issue of whether the imported merchandise constituted "manufactures of wool:"

> Waste, in its ordinary sense, being merely **refuse thrown off in the process** of converting raw wool into a manufacture of wool, **cannot be considered a manufacture simply because it acquires a new designation**, and, if it be artificially produced by the breaking up of tops, it is with even less reason entitled to be so considered. Unless natural waste can be treated as a manufacture, artificial waste should not.

*Id.* at 508 (emphasis added). The Court thus plainly recognized a distinction between "waste" and "manufactured articles". The Court concluded that the imported merchandise was not waste, because it had not actually been "thrown off in the process of manufacture." *Id.* at 505. The Court also concluded that the merchandise was not "manufactured":

---

[15] Not surprisingly, each decision cited in this opinion in which the importer urged classification of merchandise as "waste" involved a lower duty rate for such a classification than Customs' alternative.

> [T]he article in question does not fall within the definition of "manufactures" as laid down by this court in numerous cases. Thus, in *U.S. v. Potts*, 5 Cranch, 284, round copper bottoms turned up at the edge, **not imported for use in the form in which they were imported**, but designed to be worked up into vessels, were held not to be manufactured copper within the intention of the legislature. So, in *Hartranft v. Wiegmann*, 121 U. S. 609, shells cleaned by acid, and then ground on an emery wheel, and some of them afterwards etched by acid, and intended to be sold for ornaments, as shells, were held to be 'shells,' and not 'manufactures of shell.' The question is fully discussed in *Lawrence v. Allen*, 7 How. 785, in which, however, it was held that India rubber shoes made in Brazil, by simply allowing the sap of the India rubber trees to harden upon a form, were manufactured articles, because they were **capable of use in that shape** as shoes. Indeed, this was the form in which such shoes were at first made. Finally, in *Seeberger v. Castro,* 153 U. S. 32, tobacco scrap, consisting of clippings from the ends of cigars and pieces broken from tobacco, of which cigars are made in the process of such manufacture, **not being fit for use in the condition in which they are imported**, were held to be subject to duty as unmanufactured tobacco. This scrap is in the nature of waste, and the case is directly in point.

*Id.* at 509 (citations omitted) (emphasis added). Under this analysis, the determinative question in ascertaining whether an article has been "manufactured" is whether the merchandise at issue is fit for some use or application, either as an ingredient or a finished article, without further processing.

The decision in *Harley Co. v. United States*, 14 Ct. Cust. App. 112, 114-15 (1926), provides further guidance regarding the distinctions between "waste" and articles that have been manufactured or produced:

> Waste is something rejected as worthless or not needed; surplus or useless stuff; especially the refuse of a manufacturing process or industrial art, as coal dust or gob; tangled spun thread (usually cotton); the refuse of a textile factory; . . . **broken or spoiled castings for remelting**.
>
> Since 1883 Congress has recognized the following as wastes: Wool waste, . . . cork waste, scrap or refuse rubber, worn out by use, **iron and steel fit only for remanufacture**. . . .
>
> In the tariff sense, waste is a term which includes manufactured articles which have become useless for the original purpose for which they were made and fit only for remanufacture into something else. It also **includes refuse, surplus, and useless stuff resulting from manufacture or from manufacturing processes and commercially unfit, without remanufacture, for the purposes for which the original material was suitable**

> and from which material such refuse, surplus, or unsought residuum was derived. The latter class of waste might be appropriately designated as new waste and includes such things as tangled spun thread, coal dust, broken or spoiled castings **fit only for remanufacture**.[16]

*Id.* (citations omitted) (emphasis added). *See also Barnebey-Cheney Co. v. United States*, 487 F.2d 553 (CCPA 1973) (concluding that merchandise consisting of spent activated carbon salvaged from canisters of gas masks was in fact "waste", as it was "fit only for remanufacture"; the record showed that the importer subjected the spent carbon to a purification process to remove the absorbed chemicals, and that the merchandise was not commercially suitable for any application prior to the removal of those chemicals).[17] By contrast, an item "which may be repaired without undue expense and devoted to its original purpose, or which, without remanufacture, has a valuable practical use, is not waste or old junk." *Harley*,14 Ct. Cust. App. at 115.

The decision in *E.T. Horn Co. v. United States*, 14 CIT 790, 752 F. Supp. 476 (1990), *aff'd and adopted*, 945 F.2d 1540 (Fed. Cir. 1991), articulates part of the rationale for the distinction between waste and manufactured articles. In that case, the court considered the classification of certain chemical residues, where the importer claimed that the merchandise at issue should have entered duty free under TSUS item 793.00, "[W]aste and scrap not specially provided for." *Id.* at 790, 752 F. Supp. at 477. Customs had classified the merchandise as "[M]ixtures of two or more organic compounds: . . . Other", under TSUS item 430.20. *Id.* The residues remained after distillation and production of the intended products of the manufacturing process, and had a recognized market value. The court observed that

> Customs has classified waste of a chemical nature under [TSUS 793.00], although a notable feature of those substances has been unsuitability for chemical use or purposes in the conditions imported without further processing.
>
> **A raw material or product usually has been favored under the import laws, while a material or product improved abroad usually has been subject to a higher rate of duty upon entry**. Also, it has not been general policy for material

---

[16] In *United States v. Studner*, 427 F.2d 819 (CCPA 1970), the court rejected an argument by Customs that, to constitute "waste," goods must be "fit only for remanufacture." *Id.* at 820-21. It rejected as dicta those statements in *Harley* that imposed such a requirement, and stated that there was no basis for a "fit only for remanufacture" requirement for old waste when it found none for new waste. 427 F.2d at 822. Upon careful review, it appears that *Harley's* imposition of a "fit only for remanufacture" requirement was not in fact dicta, and was critical to the ultimate holding in that case. Ironically, the *Studner* court's statement regarding new waste was itself dicta, and offers no precedential value, as it was not called on to assess the proper duty for new waste.

[17] An examination of the treatment of stainless steel scrap in the HTSUS underscores the validity of this definition in the context of stainless steel scrap. HTSUS Subheading 7204.21.00 covers "Waste and scrap of alloy steel: Of stainless steel" and provides for duty-free entry of such goods. The applicable Section Notes for HTSUS Section XV, Base Metals and Articles of Base Metals, provide the following definition of "Waste and scrap": "Metal waste and scrap from the manufacture or mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons." HTSUS Section XV, Note 8(a). This definition provides a Congressional interpretation of the terms "waste" and "scrap" in this context.

> from used or spent products to be dutiable at the same rate as new material. Thus, to distinguish between chemical products and chemical waste accords with the traditional approach of tariffs.

*Id.* at 795-96, 752 F. Supp. at 481 (citations omitted) (emphasis added). The court ultimately concluded, however, that the residues

> possess identifiable chemical properties and . . . are traded for those properties. There is little indication of uselessness of the merchandise in the condition imported. On the contrary, it appears that the [residues], like the [intended products of the manufacturing process], function in their natural conditions as chemical intermediates. In other words, the products at issue are useful and are used as is to make desired end products. . . . That something is a residue of a process does not automatically render the substance waste, entitled to entry duty-free. Changes in technology or demand can and do render what was once waste matter which is sought for its own sake.

*Id.* at 796-97, 752 F. Supp. at 482 (citations omitted).

Customs has applied these same definitions in numerous decisions. While those decisions have no precedential value for this court, they help to illustrate the proper application of the "substantial transformation" or "name, character or use" test.

In C.S.D. 82-96, 16 Cust. B. & Dec. 860 (1982), Customs considered whether drawback was payable on certain substandard semiconductor devices which resulted from the production of standard devices. The substandard devices had the same "form, identity and characteristics" as the standard devices; the only difference was that the former devices were much less reliable and much slower than the latter. 16 Cust. B. & Dec. at 860. Because of this difference, the substandard devices were salable only in a broad secondary market, which exceeded the scrap value of the devices. *Id.* As a factual matter, however, the importer destroyed the devices in a foreign trade zone, to avoid warranty claims. *Id.* Customs allowed drawback, concluding that the standard and substandard devices were merely different brands of the same finished product. *Id.*

In C.S.D. 82-109, Customs considered whether tobacco scrap, tobacco stems, and tobacco dust and dirt, all of which were "fit only for remanufacture," were on the one hand "waste" or "valuable waste", or were properly included within the definition of "articles". 16 Cust. B. & Dec. 882 (1982). Under the TSUS provisions at issue, articles produced from merchandise temporarily imported under bond were required to be exported or destroyed, while valuable wastes were permitted to be entered into the country upon payment of the proper duty. *See* 16 Cust. B. & Dec. at 883. The importer sought to enter the tobacco scrap as valuable waste. *Id.*

Customs differentiated between "by-products" and "wastes". Customs reviewed the use of the terms in the tariff statutes, noting that

> it is clear that Congress intended different meanings for by-products and waste. For example, the first proviso to section 311, Tariff Act of 1930, as amended (19 U.S.C. 1311), which concerns processing in bonded manufacturing warehouses, allows by-products and waste from cleaning rice to be withdrawn for domestic consumption on payment of duty. The second proviso to that section allows all waste to be destroyed under Customs supervision. Section 313, Tariff Act of 1930, as amended (19 U.S.C. 1313) requires distribution of drawback if more than one article was produced as a result of the use of imported merchandise in a manufacturing process. The courts have construed this latter provision to require distribution of drawback to by-products, which clearly indicates that the term "article" includes by-products.

*Id.* at 884. Customs then reviewed a number of judicial decisions, pulling from them a variety of characteristics which distinguished waste from byproducts. Waste has "neither the qualities of the starting raw materials or the qualities of an article that is sought or purposely produced." *Id.* at 884 (citing *Willits v. United States*, 11 Ct. Cust. App. 499 (1923)). Waste is "not the product of any manufacturing effort designed to produce it as a primary product or as an equally valuable by-product," but is a "thrown-off incident of . . . production." Id. at 884-85 (citing *Ishimitsu Co. v. United States*, 12 Ct. Cust. App. 477 (1925)). If an item is "required to have labor expended on it in order to make it fit for consumption, [the item is] not classifiable as a manufactured article." *Id.* at 885 (citing *Spaulding v. Castro*, 153 U.S. 38 (1894)). Byproducts, on the other hand, were characterized as "new articles that were chemically different from the original raw materials and which had specific uses in their own rights," that were "specifically sought for [their] own value." *Id.* Based on these criteria, Customs held that the tobacco scrap was waste rather than a by-product. *Id.* The court finds that these distinctions help to demarcate the boundary between "waste" and "articles manufactured or produced."

Shortly thereafter, Customs issued C.S.D. 83-5, 17 Cust. B. & Dec. 728 (1982), in which it enumerated six criteria for determining whether a given item was properly characterized as waste or as a by-product. Noting that "drawback is allowable on exports of by-products but not on exports of valuable waste," Customs examined:

1. The nature of the material of which the residue is composed.
2. The value of the residue as compared to the value of the principal product and the raw material.
3. The use to which it is put.
4. Its status under the tariff law, if imported.
5. Whether it is a commodity recognized in commerce.
6. Whether it must be subjected to some process to make it saleable.

17 Cust. B. & Dec. at 729. These criteria incorporate many of the considerations that the courts have employed in making determinations in this area. *See* decisions reviewed *supra*. Under these guidelines, Customs determined that the merchandise at issue, rejected tubing, was a by-product, because the merchandise at issue differed from the principal product only in that it did not meet A.P.I. specifications. *Id.* at 729. While not useful as premium oil well tubing, the merchandise appeared to have a number of other uses, without any further processing, that were incompatible with classification as waste. *Id.*

Customs applied these criteria in subsequent rulings, providing further elaboration on their meaning. In C.S.D. 84-40, 18 Cust. B. & Dec. 934 (1983), Customs considered whether certain steel tubing and casing, which had been entered temporarily free of duty under bond for fabrication and exportation and was subsequently rejected for various abnormalities, was "valuable waste". *Id.* at 935. The record showed that repair was not an economically feasible option, and that the rejected tubing was best remelted, reextruded, and used in the creation of new tubing. *Id.* at 936. Applying the first criterion, Customs noted that the tubing was no longer suitable for its original purpose, although it was still pipe or tube. *Id.* at 937. Under the second criterion, the value of the goods was nominal – the rejected article had a scrap value of approximately $15, while the un-flawed article was valued at approximately $450. *Id.* The merchandise at issue was used only as scrap. *Id.* No further processing was needed to make the merchandise salable as scrap. *Id.* Customs concluded that the rejected tubing and casing, "when sold as waste or scrap at scrap prices, is valuable waste." *Id.* at 939. Customs distinguished C.S.D. 82- 96, *supra*, in which it had approved drawback on substandard semiconductor devices, by noting that the semiconductor devices had the same identity, characteristics and TSUS classification as the standard devices, while the rejected tubing did not share those elements with the standard counterparts. *Id.*

The definitions set forth above, as expounded upon by numerous decisions, can be summarized to yield the following standards. To prevail on a claim that its merchandise is an article manufactured or produced within the meaning of § 1313(b), a plaintiff must satisfy the "substantial transformation" or "name, character or use" test. The court will look to whether a "new and different article" has emerged — whether the exported merchandise is fitted for a distinctive use for which the imported merchandise was not, or whether it is suitable for a more specialized range of uses than the imported merchandise, or whether it is interchangeable, commercially or otherwise, with the imported merchandise. A transitional product may not be sufficient under this criteria. The court will weigh the cost incurred in subjecting the merchandise to the processes at issue, and will also look for proof regarding the amount and percentage of value added by these processes. The court will consider changes to the character of

the merchandise – whether there are changes in the chemical composition of the material or in its physical properties, and whether those changes are irreversible. Finally, the court will consider whether there is a change in the name of the merchandise, and whether there is a change in its tariff classification. No one among these criteria is controlling.

On the other hand, the court will also look for proof as to whether the merchandise at issue falls within the definition of "waste". To this end, the court will consider whether the merchandise is suitable for the ordinary use of the primary product or as a by-product, or whether it is thrown off in the process of manufacture. Is the merchandise purposely produced? Is the merchandise exported for use in that form, or must it be remanufactured? "Remanufacture" will mean processing of the good to render it usable as, in essence, a raw material. If, on the other hand, the article may be repaired or further processed at minimal expense into a good which has a practical use, such repairs do not constitute remanufacture.

### 3. *Plaintiff Has Not Met Its Burden Under 19 U.S.C. § 1313(b) and Related Law*

Subjecting Plaintiff's motion to these standards, the court concludes that Plaintiff has not met its burden on summary judgment. The court has in vain reviewed Plaintiff's submissions for evidence which might prove sufficient to resolve this case. The documentary evidence and depositions are insufficient to demonstrate that the stainless steel scrap is an "article manufactured or produced." There is some evidence regarding the processes to which the imported merchandise is subjected.[18] The record is devoid, however, of evidence as to whether these processes added value to the exported merchandise — does scrap sell for more or less than "virgin material"?[19] Is scrap resulting from these processes more valuable or sought-after than scrap that results from other processes? Is such scrap fitted for more specific uses than the virgin material?[20] Are the qualities imparted by these processes lost in the remelting process?

---

[18] "Precision imported 'hot bands, a product whose tolerances are not as close as cold-finished steel.' Following importation, Precision would z-mill cold-roll, continuous-strand anneal, temper mill, slit, sheet, polish, edge, roller level, shear and stretcher level the imported steel." App. B at 2. "The metallurgical properties (e.g. chemistry, tensile strength) of the residual material are the same regardless of whether the product is ultimately sold as stainless steel sheet, coils, trim, or scrap." App. A-21 at 3. "Cold-rolling . . . hardens the steel as it rolls through the Z-mill. For some products . . . we anneal (or 'soften') it through a heat process." App. O (Declaration of Alan Shaible, dated March 30, 2000) at 2.

[19] Certain items in the record address this point, but are inconclusive. "[I]f they elected to make the stainless steel product from virgin material, they could do so but it's much more expensive . . . ." App. K (Deposition of Stephen A. Weiner, taken February 29, 2000) at 58. "Stainless steel scrap is a valuable commodity that reduces our costs . . . ." App. O at 5. "The scrap ratio [in the product into which the scrap is made] is also influenced by the relative cost of scrap and hot metal." App. M (*The Making, Shaping and Treating of Steel* (11th ed. 1998)) at 491.

[20] Evidence on this point is also inconclusive. "[I]f you have a bale of 300 series stainless steel – which is basically the export terminology sabot, s-a-b-o-t – you couldn't use that to make a 400 series stainless steel because of the nickel units, okay? So if you have a bale of sabot, you can only use it to make a 300 series stainless steel." App. K at 59. "Stable elements present in scrap, such as copper, molybdenum, tin and nickel cannot be oxidized and hence cannot be removed from metal. These elements can only be diluted. Detinned bundles, where tin is removed by shredding and treating with NaOH and then rebaled, are available but at considerably higher cost." App. M at 491.

Plaintiff attempts to distinguish stainless steel scrap and trim from other substances created during the manufacturing process, such as "filter cake" and "swarf", for which no market exists and for which plaintiff incurs disposal costs. Plaintiff's Brief at 16-17. Plaintiff argues that stainless steel scrap is not waste because it is valuable, citing to expert affidavits of persons knowledgeable in the industry. Id. at 14, 17. Plaintiff contends that only such nonmarketable, apparently valueless items as "filter cake" and "swarf" are "waste" within the meaning of the 19 C.F.R. § 191.22(a)(2). Plaintiff implicitly contends that the term "waste" applies only to items for which no market exists – essentially, valueless items.

This distinction is not tenable, in light of the legal definition, detailed *supra,* of the terms "waste" and "article manufactured or produced," which Plaintiff has ignored. First, the drawback prohibition of 19 C.F.R. 191.22(a)(2) applies not only to mere "waste", but also to "valuable waste". Second, under the governing law in this field, there is no basis for a distinction between "waste" and "valuable waste". The value of an article is only one consideration, and that factor requires a quantitative comparison between the imported article and the exported article, not between the exported article and another article yielded by the process. Plaintiff has failed to provide such an analysis.

Plaintiff argues that "Customs has insufficient grounds to support its conclusion that the merchandise at issue is waste." Plaintiff's Brief at 17. Plaintiff's arguments on this point subject Customs' ruling to the yardstick of Plaintiff's factual argument, and ignore the legal standards that govern this area of the law. Plaintiff's contention is without merit. Moreover, it is Plaintiff, rather than Customs, that bears the burden of proof here.

Plaintiff's arguments based on the classifications of scrap metal under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 (1999) *et seq.*, and the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6901 (1984) *et seq.*, are equally misplaced. Plaintiff has elected to ignore the extensive body of law in the drawback context, and has relied on authority in wholly unrelated areas of the law. Customs' regulations and those cited by Plaintiff are promulgated under completely different statutes and hence one cannot be considered binding on the other. Moreover, the policies underlying the regulations are quite different and the interests of one would not be furthered by relying on the other. *See Nat'l Juice Products*, 10 CIT at 60 n.15, 628 F. Supp. at 989 n.15. "The theory underlying the granting of drawback . . . is and always has been that it would encourage the development in the United States of the making of articles for export, thus increasing our foreign commerce and aiding domestic industry and labor." *Int'l Paint*, 35 CCPA at 90. The purpose of the CERCLA amendments cited by Plaintiff is threefold:

> to promote the reuse and recycling of scrap material in furtherance of the goals of waste minimization and natural resource conservation while protecting human health and the environment; 2) to create greater equity in the statutory treatment of recycled versus virgin materials; and (3) to remove the disincentives and impediments to recycling created as an unintended consequence of the 1980 Superfund liability provisions."

Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, § 6001, 113 Stat. 1501, 1501A-598-99 (2000). The objectives of RCRA are to promote the protection of health and the environment and to conserve valuable material and energy resources by promoting improved solid waste management, resource recovery, and resource conservation systems, regulating the treatment, storage, transportation, and disposal of hazardous wastes which have adverse effects on health and the environment. RCRA, Pub. L. No. 94-580, § 1003, 90 Stat. 2795 (1976). The purposes of the latter acts bear no resemblance to that of the drawback statute. In light of this divergence, and in light of the significant existing authority under the drawback statute, the court declines to accept Plaintiff's CERCLA- and RCRA-based arguments.

For these reasons, the court finds that Plaintiff has failed to satisfy its burden of proof to show that the characteristics of the merchandise at issue bring it within the range of goods eligible for drawback.

### C. *Customs' Denial of Plaintiff's Protest Did Not Violate 19 U.S.C. § 1625(c)*

Plaintiff argues that, even if the court concludes that Customs' denial of Plaintiff's protest was otherwise proper, it is entitled to summary judgment. As grounds for this assertion, Plaintiff argues that Customs' determination that Precision's stainless steel scrap is not eligible for drawback can only be applied prospectively, under 19 U.S.C. § 1625 (1994)[21].

---

[21] This statute provides as follows:

§ 1625. Interpretive rulings and decisions; public information

(a) Publication

Within 90 days after the date of issuance of any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision under this chapter with respect to any customs transaction, the Secretary shall have such ruling or decision published in the Customs Bulletin or shall otherwise make such ruling or decision available for public inspection.

(b) Appeals

A person may appeal an adverse interpretive ruling and any interpretation of any regulation prescribed to implement such ruling to a higher level of authority within the Customs Service for de novo review. Upon a reasonable showing of business necessity, any such appeal shall be considered and decided no later than 60 days following the date on which the appeal is filed. The Secretary shall issue regulations to implement this subsection.

**(c) Modification and revocation**

**A proposed interpretive ruling or decision which would**

(1) modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days; or

Footnote 21 Continued on next page

Precision relies on § 1625(c)(2). Plaintiff's Brief at 28. These provisions of § 1625(c) were added in 1993; they did not have a counterpart in earlier versions of § 1625. *See* 19 U.S.C. § 1625(c) (1988). The pertinent language was added as part of amendments made by the Customs Modernization Act (commonly referenced as the "Mod Act"), Pub. L. No. 103-182, 107 Stat. 2057 (1993).

There have been few decisions to date implicating § 1625(c), and none has set forth a framework for application of its provisions. Unfortunately, the legislative history of § 1625(c) offers no guidance. The lack of any specific legislative history, however, does not eliminate this court's duty to employ the plain meaning of the language that the Congress adopted. *United States v. Bornstein*, 423 U.S. 303, 310 (1976). The Supreme Court has stated that "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires [courts] to assume that 'the legislative purpose is expressed by the ordinary meaning of the words used.'" *United States v. Locke*, 471 U.S. 84, 95 (1985) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)).

From the plain wording of the statute, § 1625(c)(2) is violated when: (1) an interpretive ruling or decision (2) effectively modifies (3) a "treatment" previously accorded by Customs to (4) "substantially identical transactions", and (5) that interpretive ruling or decision has not been subjected to the notice-and-comment process outlined in § 1625((c)(2). Plaintiff must show then that Customs' October 10, 1997 denial of Precision's protest was a ruling, and that it changed a "treatment" previously accorded by Customs to substantially identical transactions, and that Customs failed to follow the notice-and-comment procedure outlined in § 1625(c)(2).

Prior to the passage of the Mod Act, the substance of these require-

---

Footnote 21 Continued

> **(2) have the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions;**
>
> **shall be published in the Customs Bulletin. The Secretary shall give interested parties an opportunity to submit, during not less than the 30 day period after the date of such publication, comments on the correctness of the proposed ruling or decision. After consideration of any comments received, the Secretary shall publish a final ruling or decision in the Customs Bulletin within 30 days after the closing of the comment period. The final ruling or decision shall become effective 60 days after the date of its publication.**
>
> (d) Publication of customs decisions that limit court decisions
>
> A decision that proposes to limit the application of a court decision shall be published in the Customs Bulletin together with notice of opportunity for public comment thereon prior to a final decision.
>
> (e) Public information
>
> The Secretary may make available in writing or through electronic media, in an efficient, comprehensive and timely manner, all information, including directives, memoranda, electronic messages and telexes which contain instructions, requirements, methods or advice necessary for importers and exporters to comply with the Customs laws and regulations. All information which may be made available pursuant to this subsection shall be subject to any exemption from disclosure provided by section 552 of title 5.
>
> (Emphasis supplied indicates portions on which Plaintiff relies.).

ments already appeared, in more detailed and more discretionary form, in 19 C.F.R. § 177.10 (1993)[22]. *See American Bayridge Corp. v. United States*, 35 F. Supp. 2d 922, 939 (1998) (*partially vacated on other grounds*, 217 F.3d 857 (Fed. Cir. 1999)) ("The Court thinks it no small coincidence that nearly identical language has moved from the Code of Federal Regulations to the United States Code, appearing as 19 U.S.C. § 1625(c), but absent discretionary language."). When Congress enacts a law it is presumed to know the existing law pertinent to legislation it enacts. *See Bristol-Myers Squibb Co. v. Royce Laboratories, Inc.*, 69 F.3d 1130, 1136 (Fed. Cir.1995); *Koyo Seiko Co., Ltd. v. United States*, 36 F.3d 1565, 1572 (Fed. Cir.1994); *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1581 (Fed. Cir.1990); *United States v. Douglas Aircraft Co.*, 510 F.2d 1387, 1391-92 (1975) (stating Congress is presumed to know of the existence of regulations).

The wording of § 1625, on the whole, bears a striking resemblance, paragraph by paragraph, to that already embodied in § 177.10: § 1625(a) parallels § 177.10(a); § 1625(c) closely tracks the concepts and structure of § 177.10(c); § 1625(d), like § 177.10(d), deals with rulings

---

[22] Section 177.10 provided, at the time, in pertinent part:

177.10 Publication of decisions.

(a) *Generally*. Within 120 days after issuing any precedential decision under the Tariff Act of 1930, as amended, relating to any Customs transaction (prospective, current, or completed), the Customs Service shall publish the decision in the Customs Bulletin or otherwise make it available for public inspection. For purposes of this paragraph a precedential decision includes any ruling letter, internal advice memorandum, or protest review decision. Disclosure is governed by 31 CFR Part 1, 19 CFR Part 103, and 19 CFR 177.8(a)(3).

(b) *Rulings regarding a rate of duty or charge*. Any ruling regarding a rate of duty or charge which is published in the Customs Bulletin will establish a uniform practice. A published ruling may result in a change of practice, it may limit the application of a court decision, it may otherwise modify an earlier ruling with respect to the classification or valuation of an article or any other action found to be in error or no longer in accordance with the current views of the Customs Service, or it may revoke a previously published ruling or a previously issued ruling letter.

(c) *Changes of practice or position*. (1) Before the publication of a ruling which has the effect of changing a practice and which results in the assessment of a higher rate of duty, notice that the practice (or prior ruling on which the practice is based) is under review will be published in the FEDERAL REGISTER and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change. This procedure will also be followed when the contemplated change of practice will result in the assessment of a lower rate of duty and the Headquarters Office determines that the matter is of sufficient importance to involve the interests of domestic industry. No advance notice will be provided with respect to rulings which result in a change of practice but no change in the rate of duty.

(2) Before the publication of a ruling which has the effect of changing a position of the Customs Service and which results in a restriction or prohibition, notice that the position (or prior ruling on which the position is based) is under review will be published in the FEDERAL REGISTER and interested parties given an opportunity to make written submissions with respect to the correctness of the contemplated change. This procedure will also be followed when the change of position will result in a holding that an activity is not restricted or prohibited and the Headquarters Office determines that the matter is of sufficient importance to involve the interests of the general public.

(d) *Limiting rulings*. A published ruling may limit the application of a court decision to the specific article under litigation, or to an article of a specific class or kind of such merchandise, or to the particular circumstances or entries which were the subject of the litigation.

(e) *Effective dates*. Except as otherwise provided for in the ruling itself, all rulings published under the provisions of this part shall be applied immediately. If the ruling involves merchandise, it will be applicable to all unliquidated entries, except that a change of practice resulting in the assessment of a higher rate of duty or increased duties shall be effective only as to merchandise entered for consumption or withdrawn from warehouse for consumption on or after the 90th day after publication of the change in the FEDERAL REGISTER.

19 C.F.R. § 177.10 (1993).

that limit court decisions. Subsection 1625(c), however, is broader in scope than its predecessor: for example, it requires publication of *any* "ruling" (or "decision" – an additional word which appears to further broaden the reach of § 1625(c)) which would modify or revoke a prior ruling or decision, where its predecessor only required publication of certain rulings which would result in assessment of a different rate of duty. Subsection 1625(c) also requires publication when a ruling would modify a prior "treatment" – a term that is not found in 19 C.F.R. § 177.10. This term does, however, appear in the related provisions of 19 C.F.R. § 177.9(e) (1993).[23] *See American Bayridge*, 35 F. Supp. 2d at 939-40.[24]

The court has found no regulation or decision defining the term "treatment" for purposes of § 1625(c) or its predecessor regulations. Nor does the legislative history offer any guidance on this point. When a word is undefined in a statute, the agency and the reviewing court normally give the undefined term its ordinary meaning. *See Perrin*, 444 U.S. at 42. "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Brookside Veneers*, 847 F.2d at 789.

Webster's Dictionary provides the following relevant definitions of the term "treatment":

> **1 :** the action or manner of treating: as **a :** conduct or behavior towards another party (as a person, thing, or group) <regulations . . . for the ~ of all interned civilians –J.S.Pictet> . . . **d :** the action or manner of dealing with something often in a specified way <get capital gains ~ on income from a patent sale –J.T. Norman> <views . . . on the proper ~ of the conquered southern

---

[23] Section 177.9(e) provided, at the time § 1625 was enacted, as follows:

> (e) *Ruling letters modifying past Customs treatment of transactions not covered by ruling letters*–(1) *General*. The Customs Service will from time to time **issue a ruling letter covering a transaction or issue not previously the subject of a ruling letter and which has the effect of modifying the treatment previously accorded by the Customs Service to substantially identical transactions** of either the recipient of the ruling letter or other parties. Although such a ruling letter will generally be effective on the date it is issued, the Customs Service may, upon application by an affected party, delay the effective date of the ruling letter, and continue the treatment previously accorded the substantially identical transaction, for a period of up to 90 days from the date the ruling letter is issued. (2) *Applications by affected parties*. In applying to the Customs Service for a delay in the effective date of a ruling letter described in paragraph (e)(1) of this section, an **affected party must demonstrate to the satisfaction of the Customs Service that the treatment previously accorded by Customs to the substantially identical transactions was sufficiently consistent and continuous that such party reasonably relied thereon in arranging for future transactions**. The evidence of past treatment by the Customs Service shall cover the 2-year period immediately prior to the date of the ruling letter, listing all substantially identical transactions . . . . The evidence of reliance shall include contracts, purchase orders, or other materials tending to establish that the future transactions were arranged based on the treatment previously accorded by the Customs Service.

19 C.F.R. § 177.9(e) (1993) (emphasis added).

[24] "Modification and revocation of ruling letters were discussed in the old regulations but were not present in 19 U.S.C. § 1625 prior to its amendment by the Mod Act. . . . [T]he issuance of a ruling letter that would have the effect of modifying treatment previously accorded by Customs to substantially identical transactions appeared in 19 C.F.R. § 177.9(e). . . . The amended language of the statute removes the discretion to publish found in the regulation . . . ." *American Bayridge*, 35 F. Supp. 2d at 939-40.

states –Carol L. Thompson> <a passage remarkable for its ~ of the age-old problem of freedom and authority –R.M.Weaver> . . . **6 :** the techniques or actions customarily applied in a specified situation: as **a :** a pattern of actions (as insults, annoyances, or physical punishment) designed to punish or persuade <the new recruit got the ~ from a brutal sergeant> **b :** a pattern of actions (as the bestowal of gifts or favors) designed to reward, encourage, or convince <getting the standard ~ of cocktail parties, press interviews and deals with advertisers –*Time*>

Webster's Dictionary at 2435. Recurrent in this definition are words such as "often", "customarily" and "pattern" — all terms which necessitate multiple occurrences. This echoes the requirement in 19 C.F.R. § 177.9(e)(2) that the importer show "consistent and continuous" treatment of "substantially identical transactions." On the other hand, § 177.9(e)(1) does at one point use the term "treatment" with regard to a single transaction: "the treatment previously accorded the substantially identical transaction." It would thus appear that under § 177.9(e), the handling of a single transaction could conceivably give rise to a "treatment". Section 1625(c)(2), however, speaks of a "treatment" accorded to "substantially identical transactions" – transactions here is plural. It would thus appear that the requirements of § 1625(c)(2) are not implicated by a single antecedent transaction. How many "transactions" then are needed to give rise to a "treatment" sufficient to trigger the protections of § 1625(c)?

The court finds some guidance on this point by noting that the use of the word "treatment", rather than "position", represents a Congressional departure from the language of the apparent source text of § 177.10. The court can only assume that this change was made in an effort to move away from the strict judicially-created definition of the term "position". At the time § 1625(c) was enacted, the courts required a showing of substantial proof as a prerequisite for any finding of a "position" under § 177.10. *See Superior Wire v. United States*, 867 F.2d 1409, 1413 (Fed. Cir. 1989) (rejecting argument that a letter ruling, available to the public on microfiche but not published in the Customs Bulletin, constituted a "position" changeable only after notice in the Federal Register and public comment); *Arbor Foods, Inc. v. United States*, 9 CIT 119, 123, 607 F. Supp. 1474, 1478 (1985) ("Customs' establishment of a 'position' would be along the same lines as that of an 'established and uniform practice' under 19 U.S.C. § 1315(d) (1982). In that respect, such a 'position' or 'practice' would require uniform liquidations among the many ports over a period of time."); *Nat'l Juice Products Assoc.*, 10 CIT at 62-64, 628 F. Supp. at 992-93 (finding that a "position" did exist because Customs published several rulings in the Customs Bulletin that supplied a factually explicit description of a position in effect for at least six years). *See also Jewelpak Corp. v. United States*, 20 CIT 1402, 1406-07, 950 F. Supp. 343, 348 (1996) (finding no "position" where Customs presented unrefuted proof that Customs did not previously have an established practice or posi-

tion regarding the subject merchandise, and plaintiff admitted that classification of such containers may have varied). The assessment of whether a "position" existed looked to indicia of a formal or informal *policy* applied by Customs. It appears that a "treatment" may be found where a "position" might not – that the definition of "treatment" does not require publication or liquidation among many ports over many years. The term "treatment" looks to the *actions* of Customs, rather than its "position" or policy. It is also distinct from the terms "ruling" and "decision," which are governed by § 1625(c)(2).[25] This construction would recognize that importers may order their actions based not only on Customs' formal policy, "position," "ruling" or "decision," but on its prior actions. This construction furthers the stated legislative intent underlying § 1625(c).

It is under these criteria that the court must analyze Plaintiff's claim for relief under § 1625(c). Plaintiff has not presented the court with sufficient record evidence to conclude that all five elements of § 1625 are satisfied. The payment of drawback on 69 previous entries of stainless steel scrap was a "treatment" under § 1625(c), because those prior entries (assuming more than one of these can be shown to be "substantially identical" to the merchandise at issue) constituted more than a single transaction. While Plaintiff has not pointed to record evidence which would have risen to the level of a "position", the court is forced to conclude that the "treatment" requirement of § 1625(c) is not so stringent. However, Plaintiff has failed to provide the court with evidence documenting its claim that Customs approved drawback on substantially identical transactions. Not only has Plaintiff failed to provide information regarding the dates, ports, and exact nature of each of the earlier transactions, but it has not even provided a clear description of the merchandise on which drawback was denied. Nor has Plaintiff presented the Court with any evidence to indicate whether or not Customs followed the notice-and-comment procedure prior to the issuing the October 10 decision. The absence of record evidence on these points bars summary judgment in Plaintiff's favor.

---

[25] The fact that § 1625(c)(2) provides for relief even when the proposed ruling or decision would not modify any prior ruling forecloses any argument that there is no modification sufficient to trigger § 1625 because Customs' position was already contained in, and did not vary from, prior rulings such as C.S.D. 80-137. The bases for relief set forth in § 1625(c)(1) and (2) exist independent of each other.

## V.
## CONCLUSION

For the foregoing reasons, Defendant's Motion for Reconsideration and/or Relief From the Court's Order Dated May 24, 2000 is granted in part and denied in part.

Because Plaintiff has failed to meet its burden on summary judgment, and because the court finds outstanding issues of material fact, the Plaintiff's Motion for Summary Judgment is denied.

---

PRECISIONS SPECIALTY METALS, INC., PLAINTIFF, *v.* UNITED STATES OF AMERICA, DEFENDANT.

Court No.: 98-02-00291

[Defendant's motion for reconsideration GRANTED in part and DENIED in part. Plaintiff's motion for summary judgment DENIED.]

Decided: September 20, 2000

## ORDER

Defendant's Motion for Reconsideration and/or Relief From the Court's Order Date May 24, 2000 (the "Reconsideration Motion") and Plaintiff's Motion for Summary Judgment (the "Summary Judgement Motion") having come before the court, and the court having reviewed the pleadings and papers on file herein, good cause appearing therefor, it is hereby

ORDERED that the Reconsideration Motion is DENIED, to the extent that it seeks to file Defendant's Opposition to Plaintiff's Motion For Summary Judgment And Cross-Motion For Summary Judgment, Defendant's Statement Of Material Facts As To Which There Is No Genuine Issue To Be Tried, Defendant's Memorandum In Opposition to Plaintiff' Motion For Summary Judgment and In Support Of Defendant's Cross-Motion For Summary Judgment, and Defendant's Response To Plaintiff's Annex Pursuant To U.S. CIT Rule 56(i); and it is further

ORDERED that the Reconsideration Motion is GRANTED, to the extent that it moves the court to independently analyze the merits of the Summary Judgment Motion; and it is further

ORDERED that the Court's Order dated May 24, 2000 is partially vacated, to the extent that it granted the Summary Judgment Motion;

and it further

ORDERED that Plaintiff's Motion for Summary Judgment be and hereby is DENIED; and it is further

ORDERED that a telephonic status conference, to be originated by the Court, shall be held on Thursday, October 5, 2000 at 10:30 a.m. for the purpose of setting a trial date and schedule for pretrial submissions; and it is further

ORDERED that, at the time of the status conference, the parties shall be prepared to set a trial date.

---

## NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties on the date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

(Slip Op. 00-122)

E. I. DU PONT DE NEMOURS AND COMPANY, PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 96-12-02657

[Defendant's motion for summary judgment is denied; Plaintiff's cross-motion for summary judgment is granted.]

Domestic manufacturer and exporter of titanium dioxide pigments brought action contesting denial by United States Customs Service of its claim for manufacturing substitution drawback pursuant to 19 U.S.C. § 1313(b) (1994). Defendant moved for summary judgment, seeking dismissal of action. Plaintiff manufacturer cross-moved for summary judgment, requesting approval of proposed drawback contract, reliquidation of drawback entry, and payment of drawback claim. The Court of International Trade, Eaton, J., held that Plaintiff had satisfied the requirements of 19 U.S.C. § 1313(b) and was therefore entitled to manufacturing substitution drawback.

Decided: September 20, 2000

*Crowell & Moring LLP* (*Barry E. Cohen* and *John I. Blanck, Jr.*), for Plaintiff.
*David W. Ogden*, Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, International Trade Field Office; *Amy M. Rubin*, Civil Division, Department of Justice, Commercial Litigation Branch, for Defendant.

## OPINION

EATON, *Judge:* Before the Court are cross-motions for summary judgment filed pursuant to USCIT R. 56 by Defendant United States of America ("Government") on behalf of the United States Customs Service ("Customs") and Plaintiff E. I. du Pont de Nemours and Company ("DuPont") with respect to DuPont's claim for manufacturing substitution drawback under 19 U.S.C. § 1313(b) (1994). The Court grants summary judgment in favor of DuPont.

## JURISDICTION

The Court has exclusive jurisdiction over any civil action commenced to contest Customs' denial of a protest under 19 U.S.C. § 1515 (1994). *See* 28 U.S.C. § 1581(a) (1994); *see also Mitsubishi Electronics America, Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1992).

## BACKGROUND

DuPont is a domestic corporation engaged in various industrial enterprises worldwide. This action concerns DuPont's pigments business and, specifically, its importation of titaniferous raw materials for the manufacture and subsequent export of "Ti-Pure" brand titanium dioxide pigments. At issue is DuPont's entitlement under 19 U.S.C. § 1313(b) to a drawback upon exportation from December 1988 through March 1989 of 60 shipments of "Ti-Pure R-960" titanium dioxide pigment manufactured in the United States.

On December 3, 1991, DuPont submitted a proposed drawback contract[1] under 19 U.S.C. § 1313(b), seeking manufacturing substitution duty drawback[2] for the titanium appearing in any prospective exports of Ti-Pure titanium dioxide pigments manufactured with the use of four titaniferous ores ("feedstocks"). (Compl. at ¶ 5.) On December 6, 1991, DuPont filed a Manufacturing Drawback Certificate, No. G82-0000542, claiming a $37,540.00 drawback for titanium appearing in exported Ti-Pure R-960. DuPont designated as the basis of this claim the titanium contained in the substituted feedstock synthetic rutile, entry No. 86-247171-2, which was imported on April 3, 1986.

Following correspondence between the parties, Customs denied DuPont's proposed drawback contract, revised on or about March 4, 1994, stating that DuPont failed to comply with the "same kind and quality" requirement of Treasury Decision ("T.D.") 82-36[3] because titanium was never isolated as an element during DuPont's manufacturing process. (Compl. at Ex. 5.) Customs emphasized that the titanium actually used in the manufacturing process was always combined with another element, i.e., oxygen, and that DuPont was actually seeking titanium only as part of the compound titanium dioxide, and not as a discrete element. (Compl. at Ex. 5.)

On April 5, 1996, Customs liquidated the drawback entry at issue, refusing to allow the claim for drawback. DuPont protested the liquidation, which was denied by Customs on July 19, 1996. DuPont commenced this action on November 25, 1996.

In its Memorandum in Support of its Motion for Summary Judg-

---

[1] A party seeking drawback for exported articles under 19 U.S.C. § 1313(b) is required to submit a proposed drawback contract to Customs. *See* 19 C.F.R. § 191.21 (1996). A party's entitlement to receive a drawback is dependent upon Customs' approval of the proposed contract. *See id.*

[2] "Manufacturing substitution duty drawback" generally, is the refund of duties paid on goods imported into the United States when those goods, or domestic goods of the same kind and quality, are used in the manufacture or production of articles which are subsequently exported. *See* NEVILLE, PETERSON & WILLIAMS, CUSTOMS LAW & ADMINISTRATION § 17.1 (3d ed. 1999). The authority for allowing this drawback is found in 19 U.S.C. § 1313(b), which allows a manufacturer to recoup duties paid for imported merchandise if it uses merchandise of the "same kind and quality" to produce exported articles in accordance with the statute. *See* 19 U.S.C. § 1313(b). The statute provides:

> If imported duty-paid merchandise and any other merchandise (whether imported or domestic) of the same kind and quality are used in the manufacture or production of articles within a period not to exceed three years from the receipt of such imported merchandise by the manufacturer or producer of such articles, there shall be allowed upon the exportation . . . of any such articles, notwithstanding the fact that none of the imported merchandise may actually have been used in the manufacture or production of the exported or destroyed articles, an amount of drawback equal to that which would have been allowable had the merchandise used therein been imported . . . .

*Id.*

[3] T.D. 82-36 endeavored to amplify the statute:

> Under the drawback law (19 U.S.C. 1313(b)) drawback contracts have been approved since 1958, permitting the substitution of one domestic compound for a different imported compound when an *identical element* is sought for use in manufacturing an exported article. . . . [S]ubstitution is allowed of primary source materials to obtain a sought element even though the domestic material would be subject to a rate of duty if imported different from that assessed on the designated merchandise, if use of the different materials does not require significant change in the manufacturing process.

T.D. 82-36, 16 Cust. B. & Dec. 97, 97-98 (1982) (emphasis added); *see also* 19 C.F.R. § 191.2(x)(1) (1999); 63 Fed. Reg. 10,970, 11,008 (1998).

ment, the Government asserts that DuPont's drawback proposal fails to satisfy the statutory requirements for manufacturing substitution drawback. (Def.'s Mem. Supp. Summ. J. at 6, 11.) The Government further claims that DuPont's use of various feedstocks, and its failure to isolate the titanium as an element during its manufacturing process, takes its drawback proposal outside the scope of the requirements of T.D. 82-36, which purports to set forth the parameters within which different raw materials may be used as sources of a metallic element to satisfy the "same kind and quality" requirement of 19 U.S.C. § 1313(b). (Def.'s Mem. Supp. Summ. J. at 7, 11.)

In its Opposition to Defendant's Motion for Summary Judgment and Memorandum in Support of Cross Motion for Summary Judgment, DuPont contends that it is entitled to manufacturing substitution duty drawback because its manufacturing process satisfies the criteria found in the applicable statutory and regulatory requirements. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at 3.) Specifically, DuPont contends its operations comply with the requirements of 19 U.S.C. § 1313(b) and T.D. 82-36. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at 3.) Oral arguments on the parties' cross-motions for summary judgment were heard by the late Judge Dominick L. DiCarlo on January 7, 1999, and again before this Court on May 9, 2000.

## FACTS

In the manufacture of its titanium pigments, DuPont uses the following imported and domestic feedstocks: (1) rutile; (2) synthetic rutile; (3) titanium slag; and (4) ilmenite. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at 5; Def.'s Resp. Pl.'s Material Facts Not In Disp. ¶ 1.) DuPont's production process involves combining feedstocks and various cleansing agents in a "reaction vessel" where the materials are heated, refined, and then combined with oxygen to form titanium dioxide. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at v; Def.'s Resp. Pl.'s Material Facts Not In Disp. ¶ 2.)

The first step in DuPont's process involves heating a blend of the feedstocks in the reaction vessel with petroleum coke and chlorine. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at vi; Def.'s Resp. Pl.'s Material Facts Not In Disp. ¶ 4.) During the second phase of the process, additional chemicals are introduced into the reaction vessel to remove all of the excess waste materials, thus yielding pure titanium tetrachloride. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at vi; Def.'s Resp. Pl.'s Material Facts Not In Disp. ¶ 5.) In the third stage of the process, the pure titanium tetrachloride is combined with oxygen at a high temperature, causing a reaction in which the atomic bonds between the titanium and the chlorine split. The titanium then bonds with oxygen atoms to form pure titanium dioxide. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at vi; Def.'s Resp. Pl.'s Material Facts Not In Disp. ¶ 6.) At no time is titanium isolated as a discrete element, but rather is generated in the form of titanium dioxide. This titanium dioxide is then used in the manufacture of pigments.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." USCIT R. 56(d); *see also Marathon Oil Co. v. United States*, 24 CIT __, __, 93 F. Supp. 2d 1277, 1279 (2000). The Court should deny a motion for summary judgment if there are material facts in dispute that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). As there are no remaining questions of material fact in dispute, summary judgment is proper in this case. Accordingly, the statutory presumption of factual correctness for Customs decisions under 28 U.S.C. § 2639(a)(1) is not relevant to this case. *See Goodman Manufacturing, L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995); *Marathon Oil*, 93 F. Supp. 2d at 1279.

DISCUSSION

The question of law before the Court concerns the proper interpretation of the phrase "same kind and quality" as contained in 19 U.S.C. § 1313(b). Because much of the briefing in this case was accomplished before the United States Court of Appeals for the Federal Circuit issued its decision in *International Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999) ("*ILM*"), great attention was given by both parties to T.D. 82-36. In *ILM*, the Federal Circuit found that Customs did not seek "*Chevron*"[4] deference for T.D. 82-36 and declined to grant deference *sua sponte*. *See ILM*, 194 F.3d at 1361. In the instant case, it is unclear whether Customs is seeking *Chevron*-style deference.[5] Because Customs' position is unclear, this Court, like the Federal Circuit, declines to grant *Chevron* deference to T.D. 82-36 *sua sponte*.[6] *See ILM*, 194 F.3d at 1361.

Thus, this Court finds itself in the same posture as the Federal

---

[4] *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), requires courts to give deference to an agency's reasonable interpretation of a statutory ambiguity. *See Chevron*, 467 U.S. at 843-45.

[5] The text of the Government's Memorandum in Support of Summary Judgment merely asserts that Customs has the authority to issue rulings and that these rulings "must be consistent with the statutes they interpret; if a court finds that the two cannot be applied harmoniously, the statute must prevail." (Def.'s Mem. Supp. Summ. J. at 11.)

At the May 9, 2000 oral argument, counsel for the Government stated that, "[a]lthough . . . [Customs'] denial was worded in terms of the proposed contract's failure to meet the conditions of T.D. 82-36 . . . any suggestion that the Court can look solely to the conditions contained in the T.D. and ignore the statute is simply wrong." (Transcript of May 9, 2000 oral argument ("Tr.") 3:15-22).

[6] Had the Government requested that *Chevron* deference be extended to T.D. 82-36, this Court would have declined to do so in any event. There is no evidence that, prior to issuance, T.D. 82-36 was subjected to the type of formal rulemaking procedures that are a condition for *Chevron*-style deference. *See Christensen v. Harris County*, 120 S.Ct. 1655, 1662 (2000); *Mead Corp. v. United States*, 185 F.3d 1304, 1307 (Fed. Cir. 1999), *cert. granted*, 120 S.Ct. 2193 (2000) (No. 99-1434); *Genesco, Inc. v. United States*, 24 CIT __, __, 102 F. Supp. 2d 478, 484 (2000).

In addition, it appears to be the position of the Customs Service that T.D. 82-36 is not entitled to deference. In 1978, when it changed its system of designation of materials published in the Customs Bulletin, the Customs Service stated that henceforth the designation "Treasury Decision" would be used for documents that "contain information of an official nature which *does not constitute legal precedent* but for which a publication citation is required." T.D. 78-414, 12 Cust. B. & Dec. 920 (1978) (emphasis added).

Circuit in *ILM*, and is therefore bound by that court's construction of 19 U.S.C. § 1313(b). In *ILM*, the Federal Circuit found that titanium sponge was eligible for drawback when titanium scrap was used in its place in a manufacturing process which required titanium metal. *See ILM*, 194 F.3d at 1367. The Federal Circuit held that the scrap satisfied the statutory requirement that the "merchandise" (titanium scrap) be of the "same kind and quality" as the imported "merchandise" (titanium sponge) for which it was substituted. *See id.* The Federal Circuit reached its conclusion even though the scrap, unlike the sponge, contained other metals which were salvaged as part of the manufacturing process, and even though the welding step of the manufacturing process took longer when scrap was used. *See id.* at 1366. In its decision, the Federal Circuit found three factors to be compelling:

> First . . . it is undisputed that the titanium in the scrap was identical to the titanium in the sponge that ILM imported. Accordingly, the titanium in the domestic scrap was 'of the same kind and quality' as the titanium in the imported sponge. Second, there is no dispute as to the amount of titanium that was in the scrap. As a result, the amount of a drawback to which ILM would be entitled based upon the titanium in that scrap and the titanium in the imported sponge could be precisely determined.
>
> Third, the government's position results in a "no scrap" rule, one for which we find no support in the statute.

*Id.*

By applying the three factors that the Federal Circuit found compelling in *ILM*, this Court concludes that DuPont is entitled to drawback. First, as in *ILM*, it is undisputed that the titanium contained in each of the source feedstocks is identical. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at v; Def.'s Resp. Pl.'s Material Facts Not In Disp. ¶ 2.) Therefore, the titanium contained in the imported and domestic feedstocks is of the "same kind and quality" under 19 U.S.C. § 1313(b). *See ILM*, 194 F.3d at 1366. As the court in *ILM* explained, the underlying statutory purpose for section 1313(b) is to "facilitate honest drawback claims for such stable commodities as sugar, which present fungible difficulties, i.e., difficulties in accounting for whether the imported merchandise has actually been used in the particular article." Id. As a result of this underlying purpose, the court reasoned that the phrase "same kind and quality" should be applied only to the sought element contained in a source material, and not to the source material as a whole or the impurities contained therein. *See id.* Thus, although different ores may be made up of a number of elements, the "same kind and quality" standard applies only to the element used in manufacturing the exported article.

Second, as in *ILM*, the amount of titanium contained in the imported and domestic feedstocks can be precisely determined. There

is no dispute on this question. During the May 9, 2000 oral argument, counsel for the Government stated, "[W]e don't necessarily disagree that the titanium content can be determined." (Tr. 29:20-21.) At that same argument, counsel for DuPont stated, "The amount of titanium metal can be calculated easily." (Tr. 28:5-6.) Indeed, the amount of titanium, in pounds, for both the imported and exported merchandise is stated on the Manufacturing Drawback Certificate. Customs has never disputed the accuracy of this calculation. As there is no dispute that the amount of titanium can accurately be determined, the second *ILM* factor has been satisfied. The Government, as something of an afterthought, asserts that a ruling in favor of DuPont would place an undue burden on Customs because of the difficulty involved in calculating the proper amount of DuPont's drawback. (Def.'s Resp. Pl.'s Supplemental Submission Supp. Summ. J. at 7.) According to the Government, the rate of duty on the imported merchandise for which drawback is claimed (synthetic rutile) was an *ad valorem* rate on the value of the ore, rather than on the value of the titanium content. (Def.'s Resp. Pl.'s Supplemental Submission Supp. Summ. J. at 7.) The Government argues that any drawback would entail the difficult task of apportioning the duty paid between the synthetic rutile's titanium content and the other elements contained therein. (Def.'s Resp. Pl.'s Supplemental Submission Supp. Summ. J. at 7.) However, since the uncontroverted Manufacturing Drawback Certificate contains the necessary percentages for making the calculation, this burden would not seem to be a sufficient reason for denying DuPont its relief. Furthermore, the Government's argument that the four source feedstocks were not at the time of this action classified under the same tariff provision and are, therefore, not of the "same kind and quality," is not compelling. (Def.'s Resp. Pl.'s Supplemental Submission Supp. Summ. J. at 6-7.) This Court need not grant formal deference to T.D. 82-36 to note its statement of the self-evident, i.e., "[s]ame kind and quality does not . . . depend on the tariff schedules and never has. Often items classified under the same tariff provisions and subject to the same duty are not the same kind and quality and vice versa." T.D. 82-36, 16 Cust. B. & Dec. 97, 98 (1982).

Third, this Court, like the Federal Circuit, finds no support for the Government's argument that, during the manufacturing process, titanium must be extracted as a discrete element from the various feedstocks in order to comply with the requirements of T.D. 82-36[7] and 19 U.S.C. § 1313(b). (Def.'s Mem. Supp. Mot. Summ. J. at 13.) The situation in the instant case is remarkably similar to that in *ILM*, where the Federal Circuit did not require an extra step in the

---

[7] While the Court has declined to grant *Chevron* deference to T.D. 82-36, the Government's argument regarding the requirement under T.D. 82-36 that the sought element be isolated during the manufacturing process is relevant to this discussion because it was specifically addressed by the court in *ILM*.

manufacturing process in order to comply with the government's "no scrap" rule.[8] *See ILM*, 194 F.3d at 1366. "We see no reason why ILM should be required to undertake such an additional step when it is undisputed that the same materials (including the titanium) would have to be combined again to obtain the final export product." *Id.* As it is undisputed that DuPont extracted the sought element titanium in the useful form of titanium dioxide, this Court cannot hold that DuPont's drawback claim is inconsistent with the requirements of 19 U.S.C. § 1313(b). *See id.*

Finally, we turn to the question of whether or not the substitution of another feedstock for synthetic rutile would sufficiently alter DuPont's manufacturing process so as to defeat the notion that the feedstocks are of the same kind and quality. Both parties agree that, no matter which feedstocks are combined for use in DuPont's manufacturing process, the steps involved, the order of the steps, and the chemicals used remain constant. (Pl.'s Mem. Supp. Cross-Mot. Summ. J. at 5-7; Def.'s Resp. Pl.'s Material Facts Not In Disp. ¶¶ 3, 9.) There is also agreement that the substitution of other feedstocks for synthetic rutile would alter the time used to complete the steps, the amount of chemicals used in the process, and the amount of waste produced by the procedure. However, these changes are not changes in process, but merely routine adjustments in procedure that are made to take into account the relative purity of the ore.[9] Indeed, any questions regarding changes in the manufacturing process are rendered largely academic since, in actual practice, the various ores are almost always combined to produce a mixture with a constant titanium dioxide content. (Def.'s Statement of Facts ¶ 22.) Once again, this Court finds the decision in *ILM* instructive. The Court in *ILM* found that changes in a manufacturing process are acceptable for the purposes of allowing substitution drawback. There, the Federal Circuit found that "a thirty-six hour increase in welding time, in the context of a manufacturing process that normally takes two to three months to complete . . . [was not] significant enough to thwart the statutory objective of facilitating honest claims of drawback." *Id.* In the case at bar, the adjustments to the procedure are not substantial enough to "thwart the statutory objective of facilitating . . . drawback." *Id.*

---

[8] The Federal Circuit in *ILM* found "no support in the statute" for Customs' "no scrap" rule, which it described as follows: "[I]f . . . ILM had first expended the time and money to extract the titanium sponge from the scrap, then mixed the extract with other metals to form ingots from which exported articles were made, the government would allow drawback," but not if these extra, and unnecessary, steps were not taken. *ILM*, 194 F.3d at 1366.

[9] No single ore category contains an exact amount of titanium dioxide. Rutile contains "more than 92% titanium dioxide"; synthetic rutile contains anywhere from 90-95% titanium dioxide; slag contains anywhere from 75-90% titanium dioxide; and ilmenite contains anywhere from 35-70% titanium dioxide. (Def.'s Statement of Facts ¶¶ 12-15.) Thus, the manufacturing variations in time, chemicals, and waste that could occur among the different feedstocks could also occur with feedstocks in the same ore category.

CONCLUSION

For the foregoing reasons, the Government's motion for summary judgment is denied, and DuPont's cross-motion for summary judgment is granted. Accordingly, Customs is instructed to approve the proposed drawback contract as revised by DuPont on or about March 4, 1994, reliquidate the drawback entry, and pay DuPont's drawback claim in accordance with this decision. Judgment will be entered accordingly.

---

E. I. DU PONT DE NEMOURS AND COMPANY, PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 96-12-02657

JUDGMENT

Upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's opposition thereto and Cross-Motion for Summary Judgment, and all of the papers and proceedings herein, it is hereby

ORDERED that Defendant's Motion for Summary Judgment is denied; and it is further

ORDERED that Plaintiff's Cross-Motion for Summary Judgment is granted; and it is further

ORDERED that the United States Customs Service is directed to:

(1) approve Plaintiff's proposed drawback contract (as revised 3/4-7/94); and

(2) reliquidate the subject drawback entry and pay Plaintiff's drawback claim, plus any interest that may be required by law.

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

---

(Slip Op. 00-123)

UNITED STATES, PLAINTIFF, v. SPANISH FOODS IN.C., ET AL., DEFENDANTS, AND FAUSTO DIAZ-OLIVER, ET AL., THIRD-PARTY PLAINTIFFS, *v.* CLAUDIO L. MARTINEZ, THIRD-PARTY DEFENDANT.

Court No. 98-03-00620

[Plaintiff's motion for summary judgment denied; defendants' cross-motion for summary judgment denied.]

Dated: September 27, 2000

*David W. Odgen*, Acting Assistant Attorney General; *David M. Cohen*, Director; *A. David Lafer*, Senior Trial Counsel (*James W. Poirier*, Attorney), Commercial Litigation Branch, Civil Division, United States Department of Justice, of counsel, for plaintiff.

*Collier Shannon Scott, PLLC* (*Paul C. Rosenthal*, *John B. Brew*, *John P. Lohrer*, and *John M. Herrmann*, Esqs.) for defendant Remedios Diaz-Oliver.

*Fotopulos & Spridgeon* (*Thomas E. Fotopulos*, Esq,) for defendant Fausto Diaz-Oliver.

*Carroll & Associates, P.A.* (*Linda L. Carroll*, Esq,) for defendant Lilliam S. Martinez.

WATSON, *Senior Judge:*

INTRODUCTION

This is a civil action for penalties commenced by the Government pursuant to 19 U.S.C. § 1592, which action falls within the court's jurisdiction under 28 U.S.C. § 1582. Defendants have moved for summary judgment claiming the Government commenced this action after the expiration of the five-year statute of limitations pursuant to 19 U.S.C. § 1621. The Government has filed a cross-motion for summary judgment striking defendants' statute of limitations defense contending that this action was commenced in a timely manner. The cross-motions for summary judgment are denied on the ground that there remains triable issues of fact.

FACTUAL BACKGROUND

In September 1987, Spanish Foods, Inc. ("Spanish Foods"), which had previously conducted its business under the name of "Foods from Spain," was designated as the exclusive U.S. distributor of "La Molinera" brand food products by Hermandez-Perez Hermanos, S.A. ("HPH"). HPH was a Spanish food exporting company which owned the "Molinera" brand name and had a 51% ownership interest in Spanish Foods.

Juan Antonio Sirvent Selfa, S.A. ("JASS"), also exported food products to the United States and used Spanish Foods as its exclusive U.S. importer and distributor. Thus, Spanish Foods was importing food from both HPH and JASS.

Soon after JASS began using Spanish Foods as its U.S. distributor and importer, JASS was sued by its former U.S. distributor and importer, General Commodities International, Inc. ("GCI"), for breach of contract. The law firm of Holland & Knight represented GCI in the lawsuit against JASS.

In the course of the litigation between GCI and JASS, George Mencio, a partner of Holland & Knight, requested and received documents from Spanish Foods that revealed to GCI that a "double invoicing" system[1] existed between Spanish Foods and JASS. Furthermore, in GCI's lawsuit against JASS, GCI's attorney, Mr. Mencio, deposed one of the defendants in the current action, Lilliam Martinez, a Spanish Foods officer. Defendants concede that in her deposition in the GCI/Jass lawsuit, Ms. Martinez had admitted that Spanish Foods also had a double invoicing system with HPH.

---

[1] The expression "double invoicing" is used in this opinion to refer to an exporter's practice of issuing two invoices to the importer for the same sale that contain different prices. However, upon entry only the invoice with the lesser values is submitted to Customs by the importer or consignee. The issue in this case is whether such double invoicing system was fraudulent in violation of 19 U.S.C. § 1592, as claimed by the Government.

In early 1993, Mencio then contacted Holland & Knight's private investigator, Mr. Don Zell, to discuss the double invoicing between JASS and Spanish Foods. At a meeting, Mencio and Mr. Benigno Gonzalez, a GCI officer, briefed Mr. Zell concerning the double invoicing system and showed Zell two invoices and a cover letter from JASS to Spanish Foods that refers to those invoices. Mr. Zell was then asked by Gonzalez and Mencio to contact the U.S. Customs Service ("Customs") regarding a double invoicing system between JASS and Spanish Foods and to arrange a meeting with Customs. Zell, a former federal law enforcement officer, used his law enforcement contacts to determine the appropriate Customs' agent with which to have a meeting regarding Spanish Foods' double invoicing system. Through his sources, Mr. Zell obtained the name of Special Agent Carelli, a criminal investigator for Customs' Fraud Division.

On March 24, 1993, Mr. Zell contacted Agent Carelli by telephone. Both Zell and Carelli have been deposed concerning this telephone conversation and a subsequent meeting on March 29, 1993. In his deposition, Zell testified in substance that he recalled informing Agent Carelli that there appeared to be a "false invoicing system," as evidenced by two invoices and a cover letter, and that he provided Carelli the names of Spanish Foods and one of its officers, Lilliam Martinez.

In his deposition, however, Carelli testified that he did not recall the exact words of the conversation with Zell, but did recall that Zell requested a meeting between Holland & Knight and Customs. Carelli further testified that he did not recall Zell mentioning any invoices, cover letters, names, or any other particular details concerning double invoicing. Carelli could recall only that he had agreed to a meeting with Holland & Knight and that Zell informed him that Mencio would call him to schedule the meeting.

Additionally, Carelli's supervisor, Agent Robin Avers, was also deposed, and proffered testimony that after Zell's telephone conversation with Carelli, the latter had not given her any details concerning what would be discussed at the meeting with Holland & Knight. Avers further testified that she and Carelli went to the meeting at Holland & Knight on March 29, 1993 "in the blind," without any knowledge of what information or documents they would receive at the meeting.

There is no dispute that after the telephone conversation between Zell and Carelli, a meeting was scheduled where Customs would meet with Mr. Mencio and his client (who was not initially disclosed to Customs). Additionally, it is not disputed that on March 29, 1993, Agents Carelli and Avers met with GCI and Mencio at the offices of Holland & Knight; that GCI provided to Customs copies of two invoices with different prices covering the same sales transaction and merchandise with a cover letter evidencing double invoicing between JASS and Spanish Foods; and that at the meeting at Holland & Knight, Agents Carelli and Avers were not provided with the specific entry numbers corresponding to the invoices.

Shortly after the March 29, 1993 meeting at Holland & Knight, Customs initiated a fraud investigation which culminated both in a criminal prosecution where the defendants plead guilty to various criminal charges, and also in the commencement of the current civil action on March 27, 1998, which is five years and three days following Zell's telephone call to Carelli on March 24, 1993, but is within five years of the March 29, 1993 meeting.

### PARTIES' CONTENTIONS

Defendants contend that Zell's deposition establishes that in his telephone call to Carelli on March 24, 1993, Zell informed Carelli that his law firm, Holland & Knight, and its client (who was later disclosed to be GCI) had evidence of double invoicing involving Spanish Foods and one of its officers, Lilliam Martinez. Thus, defendants insist that the foregoing telephone call sufficiently disclosed to Customs that the double invoicing of sales transactions to Spanish Foods raised the possibility that defendants had submitted a fraudulent invoice to Customs in connection with entries. Accordingly, defendants contend that the March 24, 1993 telephone call by Zell to Carelli triggered the running of the five-year statute of limitation provided in 19 U.S.C. § 1621 for commencing a 19 U.S.C. § 1592 fraud action.

The Government, however, contends that the depositions of Carelli and Avers show that Zell merely contacted Carelli to set up a meeting with Mencio and his client, who was not disclosed, did not mention Spanish Foods or the names of any of its officers, did not mention double invoicing, and gave no details or particulars concerning fraud or the nature of any other violation of § 1592. The Government further contends that the deposition testimony shows that Agent Carelli had no knowledge of what the requested meeting would pertain to or with whom Customs would be meeting other than Zell, Mencio, and the latter's client. Therefore, the Government argues that no discovery of fraud could result from Zell's telephone call, and that the statute of limitations did not begin to run at the time of the telephone call, as claimed by defendants, but rather not until sometime after the March 29, 1993 meeting.

It is apparent that the Zell-Carelli telephone conversation of March 24, 1993 is critical to the statute of limitations issue, and that the parties' evidence as to the telephone call is diametrically opposed. Accordingly, the court concludes that summary judgment is precluded because there are genuine issues of material fact.

### DISCUSSION

Under CIT Rule 56(d), summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248

(1986); *International Trading Co. v. United States*, _ CIT _, Slip Op. 00-83 (July 14, 2000), 2000 WL 1024804 at *3. When a party moves for summary judgment, it bears the burden of demonstrating the absence of any genuine issues of material fact. *Avia Group Int'l, Inc. v. L.A. Gear California, Inc.*, 853 F.2d 1557, 1560 (Fed. Cir. 1988). However, it remains a function of the court to "determine whether there are any factual disputes that are material to the resolution of the action. The court may not resolve or try factual issues on a motion for summary judgment." *Sea-Land Service, Inc. v. United States*, 69 F. Supp. 2d 1371, 1375 (1999) (quoting *Phone-Mate, Inc. v. United States*, 12 CIT 575, 577, 690 F. Supp. 1048, 1050). *See also, Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249 (stating that "the judge's function is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial."). Therefore, the court should deny summary judgment if the parties present a "dispute about a fact such that a reasonable trier of fact could return a verdict against the movant." *Ugg Int'l. Inc. v. United States*, 17 CIT 79, 83, 813 F. Supp. 848, 852 (1993); *Pfaff Am. Sales Corp. v. United States*, 16 CIT 1073, 1074 (1992). Here, as stated above, because there are genuine issues of material fact relating to the March 24, 1993 telephone call, summary judgment as to whether this action is barred by the statute of limitations is precluded.

Where the Government establishes that false invoices have been filed by the importer at entry, the Government may seek to collect civil penalties for fraudulent, grossly negligent or negligent violations under § 1592. *United States v. Modes, Inc.*, 16 CIT 879, 880-81, 804 F. Supp. 360 (1992). Section 1592 prohibits a person, by fraud, gross negligence, or negligence from entering, introducing, or attempting to enter or introduce any merchandise into the commerce of the United States by means of (i) any document, written or oral statement, or act which is material and false, or (ii) any omission which is material. 19 U.S.C.§ 1592.

Here, the Government contends that defendants violated 19 U.S.C. § 1592 through their use of a double invoicing scheme and resulting false and fraudulent statements submitted to Customs. Actions brought under 19 U.S.C. § 1592 are subject to the following statute of limitations pursuant to 19 U.S.C. § 1621, which reads:

> No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was *discovered*: Provided, That in the case of an alleged violation of section 1592 of this title arising out of gross negligence or negligence, such suit or action shall not be instituted more than five years after the date the alleged violation was committed: * * *

19 U.S.C. § 1621 (1993) (emphasis added). "Courts have construed the first clause of §1621 to embrace the 'discovery rule' in fraud cases,

which tolls the limitations period until the time the fraud is discovered." *United States v. Ziegler Bolt and Parts Co.*, 19 CIT 13, 17 (1995) (citations omitted). Thus, "under the discovery rule the statute of limitations is tolled until the date when the plaintiff first learns of the fraud or is sufficiently on notice as to the possibility of fraud to discover its existence with the exercise of due diligence." *Modes, Inc.*, 16 CIT at 887 (citing *United States v. RITA Organics, Inc.*, 487 F. Supp. 75, 77 (N.D. Ill. 1980)). *See also, Ziegler Bolt and Parts Co.*, 19 CIT at 17; *United States v. Shabahang Persian Carpets, LTD.*, 926 F. Supp. 123, 126 (E.D. Wis. 1996).

According to defendants, Zell identified the importer (Spanish Foods), and an officer of the importer (Ms. Martinez), and disclosed double invoicing involving the importer to Agent Carelli, a fraud investigator, during their March 24, 1993 telephone conversation. Citing *Modes, supra*, defendants have raised a statute of limitations defense of asserting that Zell's telephone conversation with Agent Carelli was sufficient to put Customs on notice of the possibility of fraud to discover its existence with the exercise of due diligence. However, as indicated above, the Government's version of the telephone conversation between Mr. Zell and Agent Carelli is that Carelli only agreed to have a meeting and there was no disclosure to him of the importer's name or disclosure of any particulars concerning a violation of § 1592.

As observed in *Shabahang Persian Carpets, LTD.*, 926 F. Supp. at 126, "the determination of when the statute of limitations begins to run is a fact-specific inquiry." Specifically, when Customs first learns of the fraud or is sufficiently on notice as to the possibility of fraud to discover its existence with the exercise of due diligence is a question of fact. *See* 37 *Am Jur* 2d § 408, pp. 554-55. Moreover, as Judge Carman recognized in *Ziegler Bolt and Parts Co.*, "[t]he question of when a plaintiff discovered or reasonably should have discovered a fraud is not one which often lends itself to resolution by way of summary judgment." 19 CIT at 18 (citing *RITA Organics, Inc.*, 487 F. Supp. at 78).

Here, because the Government and defendants have submitted conflicting deposition testimony concerning the March 24, 1993 telephone conversation, genuine issues of material fact exist as to whether "discovery" occurred on that date or thereafter. Thus, the trier of fact could accept or reject defendants' version of the telephone conversation. Even if defendants' version of the telephone conversation is accepted, the trier of fact may or may not find that Customs was sufficiently on notice of the possibility of fraud on March 24, 1993. Furthermore, the trier of fact may accept the Government's version of the telephone call and find that Customs was not on notice of the possibility of fraud at that point in time, and therefore, the statute of limitations would not have commenced to run until on or after March 29, 1993, the date of the meeting.

It should be noted that defendants have demanded a trial by jury of all triable issues.

CONCLUSION

This Court finds there are genuine issues of material fact as to when Customs "discovered" the alleged fraud and when the statute of limitations under § 1621 began to run. Therefore, because triable issues of fact remain, the cross-motions for summary judgment are DENIED.[2] SO ORDERED.

---

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

---

[2] Inasmuch as at this stage of the litigation it is quite apparent to the court there are genuine issues of material fact for trial, defendants' motion for oral argument is denied. Also, in view of the denial of the cross-motions for summary judgment, defendants' motion to strike portions of the Government's Statement under CIT Rule 56(h) need not be reached and is denied.

(Slip Op. 00-124)

DAIMLER CHRYSLER CORPORATION, PLAINTIFF, *v.* UNITED STATES, DEFENDANT.

Court No. 99-03-00178

[Cross-Motions for Summary Judgment Denied.]

Dated: September 29, 2000

*Barnes, Richardson & Colburn* (*Robert E. Burke*, *Lawrence M. Friedman* and *Robert F. Seely*), for plaintiff.

*David W. Ogden*, Assistant Attorney General, *Joseph I. Liebman*, Attorney-in-Charge, International Trade Field Office, Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Saul Davis*), *Paula Smith*, Office of Assistant Chief Counsel, United States Customs Service, of counsel, for defendant.

OPINION

RESTANI, *Judge:* This Customs duty matter is before the court on cross-motions for summary judgment. No discovery has taken place and both parties seek judgment based on the factual record and the court's findings in *Chrysler Corp. v. United States*, 19 CIT 353 (1995), *aff'd*, 86 F.3d 1173, 1996 WL 132263 (Fed. Cir. 1996) (unpublished opinion) ("*Chrysler*"). Each party also alleges that if judgment is not granted on its theory of the law applicable to the facts, material facts remain to be decided and judgment may not be granted to its opponent.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(a) (1994). The court shall grant summary judgment if the pleadings, depositions, answers to interrogatories, together with any affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. USCIT Rule 56(a).

BACKGROUND

The 1991 to 1994 entries of automobiles at issue include domestic sheet metal parts which are exported and assembled into the finished automobiles in Mexico, and in the course of that assembly undergo a complicated painting process. Plaintiff seeks exemption from duty for the sheet metal parts under item 9802.00.80 of the Harmonized Tariff Schedule of the United States (codified at 19 U.S.C. § 1202 (1994)) ("HTSUS"). Item HTSUS 9802.00.80 reads as follows:

> Articles ... assembled abroad in whole or in part of fabricated components, the product of the United States, which (a) were exported in condition ready for assembly without further fabrication, (b) have not lost their physical identity in such articles by change in form, shape or otherwise, and (c) have not been ad-

> vanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating and painting.

HTSUS 9802.00.80, Supp. I. (1999).

In *Chrysler*, the court opined that it was bound by the holding of *General Motors Corp. v. United States*, which dealt with the same type of product and a similar paint process. *Chrysler*, 19 CIT at 354 (citing *General Motors Corp. v. United States*, 976 F.2d 716 (Fed. Cir. 1992) ("*GM*")). In *GM*, the court followed a line of cases beginning with *United States v. Mast Indus., Inc.*, which limit operations "incidental to the assembly process" to minor operations. *GM*, 976 F.2d at 719 (citing *United States v. Mast Indus., Inc.*, 668 F.2d 501, 505 (Fed. Cir. 1981)). In *GM*, the court held that the following legislative history supported that view:

> The amended item 807.00 would specifically permit the U.S. component to be advanced or improved "by operations incidental to the assembly process such as cleaning, lubricating, and painting." It is common practice in assembling mechanical components to perform certain incidental operations which cannot always be provided for in advance. For example, in fitting the parts of a machine together, it may be necessary . . . to paint or apply other preservative coatings. . .. Such operations, if of a minor nature incidental to the assembly process, whether done before, during, or after assembly, would be permitted even though they result in an advance in value of the U.S. components in the article assembled abroad.

*GM*, 976 F.2d at 719 (citing H.R. Rep. No. 342, 1965 U.S.C.C.A.N. 3,416, 3,448-449). *GM* and *Chrysler* also followed *Mast* in applying a set of quantitative comparisons to determine whether the process claimed to be incidental to assembly was "minor." *See GM*, 976 F.2d at 719 (listing three factors to ascertain whether operation is minor); *Mast*, 668 F.2d 506 (same); *Chrysler*, 19 CIT at 355 (listing two of the factors dispositive in that case).

The parties are now before the court because *Mast* has been undermined by the Supreme Court's decision in *United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) ("*Haggar*"). The parties agree that *Haggar*, which involved the same statute but a different product - permapressed pants, has eliminated the *Mast* comparison tests. What they do not agree on is whether *Haggar* also removed the minor operation limitation of *Mast*. Plaintiff contends that in the course of removing the *Mast* quantitative tests, and deferring to Customs' regulatory qualitative approach, the Supreme Court in *Haggar* held that "painting" was unambiguously established in the statute as a qualitative category of operation that preserves the exemption from duty of the affected part. Plaintiff relies on the following language of *Haggar*:

> The statute under which respondent claims an exemption gives direction not only by stating a general policy (to grant the partial

> exemption where only assembly and incidental operations were abroad) *but also by determining some specifics of the policy (finding that painting, for example, is incidental to assembly)*. For purposes of the *Chevron* analysis, the statute is ambiguous nonetheless, ambiguous in that the agency must use its discretion to determine how best to implement the policy in those cases not covered by the statute's specific terms.

*Haggar*, 526 U.S. at 393 (emphasis added).

Thus, plaintiff argues, in deciding that the statute was ambiguous as to permapressing and other processes not mentioned in the statute, so that Customs could establish regulatory exempt and nonexempt categories of unmentioned operations, the Supreme Court declared the three categories of operations mentioned in the statute, "cleaning, lubricating and painting," unambiguously "incidental to assembly" and not subject to Customs regulations.[1]

Defendant, on the other hand, argues that the word "painting" cannot be read in isolation, that the statute as a whole is ambiguous, and that the regulations reasonably clarify the statute. The regulation at issue reads, in relevant part, as follows:

> *§ 10.16 Assembly abroad.*
>
> *(a) Assembly operations.* The assembly operations performed abroad may consist of any method used to join or fit together solid components, such as welding, soldering, riveting, force fitting, gluing, laminating, sewing, or the use of fasteners, and may be preceded, accompanied, or followed by operations incidental to the assembly as illustrated in paragraph (b) of this section. The mixing or combining of liquids, gases, chemicals, food ingredients, and amorphous solids with each other or with solid components is not regarded as an assembly.
>
> *(b) Operations incidental to the assembly process.* Operations incidental to the assembly process whether performed before, during, or after assembly, do not constitute further fabrication, and shall not preclude the application of the exemption. The following are examples of operations which are incidental to the assembly process:
>
> (1) Cleaning;
> (2) Removal of rust, grease, paint, or other preservative coating;
> (3) Application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation;

---

[1] Prior to the Supreme Court's decision in *Haggar*, Customs' regulations were all but irrelevant to interpretation of HTSUS 9802.00.80. *See Haggar Apparel Co. v. United States*, No. 97-1002, 2000 WL 1035747, at *2 (Fed. Cir. July 27, 2000) ("*Haggar II*"). The court did not defer to regulations, but rather applied the *Mast* test. *Id.* In *Haggar*, the Supreme Court required the court to apply the analysis of *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44 (1984), to regulations interpreting tariff provisions. *Haggar*, 526 U.S. at 393-94.

(4) Trimming, filing, or cutting off of small amounts of excess materials;
(5) Adjustments in the shape or form of a component to the extent required by the assembly being performed abroad;
(6) Cutting to length of wire, thread, tape, foil, and similar products exported in continuous length; separation by cutting of finished components, such as prestamped integrated circuit lead frames exported in multiple unit strips; and
(7) Final calibration, testing, marking, sorting, pressing, and folding of assembled articles.

*(c) Operations not incidental to the assembly process.* Any significant process, operation, or treatment other than assembly whose primary purpose is the fabrication, completion, physical or chemical improvement of a component, or which is not related to the assembly process, whether or not it effects a substantial transformation of the article, shall not be regarded as incidental to the assembly and shall preclude the application of the exemption to such article. The following are examples of operations not considered incidental to the assembly as provided under subheading 9802.00.80, Harmonized Tariff Schedule of the United States (19 U.S.C. 1202):

(1) Melting of exported ingots and pouring of the metal into molds to produce cast metal parts;
(2) Cutting of garment parts according to pattern from exported material;
(3) Painting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics;
(4) Chemical treatment of components or assembled articles to impart new characteristics, such as showerproofing, permapressing, sanforizing, dying or bleaching of textiles;
(5) Machining, polishing, burnishing, peening, plating (other than plating incidental to the assembly), embossing, pressing, stamping, extruding, drawing, annealing, tempering, case hardening, and any other operation, treatment or process which imparts significant new characteristics or qualities to the article affected.

19 C.F.R. § 10.16 (1999).

Plaintiff argues alternatively that its processes abroad satisfy the regulation because the sheet metal parts are assembled and treated only with "preservative paint or coating," which is "incidental to assembly" pursuant to 19 C.F.R. § 10.16(b)(3). Defendant argues that plaintiff's operations are a significant process that completes or improves the sheet metal components and imparts distinctive or significant new features, characteristics or qualities to the article affected. Thus, it argues that the painting process is not "incidental to assembly" as provided in 19 C.F.R. § 10.16(c)(3) & (5).

DISCUSSION

I. The term "painting" in HTSUS 9801.80.00 does not prohibit application of 19 C.F.R. § 10.16 to this case.

As *Chrysler* made clear, the court concluded therein that it was bound by *GM*'s holding that any attendant paint processes must be minor to qualify a part assembled abroad for duty exemption under item 9802.80.00, and that the *Mast* factors applied in *GM* required the conclusion that the painting process at issue was not "incidental to the assembly process." *Chrysler*, 19 CIT at 355. While both parties agree that the *Mast* quantitative factor aspect of *GM* no longer applies, defendant argues that *GM*'s interpretation of "incidental to the assembly process" as limited to "minor" processes still controls.

The court finds it difficult to declare all of *GM* effectively overruled based on the words of *Haggar*. The words of *Haggar* cited by plaintiff can be read in various ways. They may mean that "painting" is an unambiguous term. They also may mean that as to "painting" the statute is less ambiguous. *See Haggar*, 526 U.S. at 393. No facts similar to the facts in this case were before the Supreme Court in *Haggar*, while very similar painting processes were before the appellate court in *GM*. *Compare Haggar*, 526 U.S. at 384-85 (addressing whether baking permapressed garments was incidental to assembly process); *and GM*, 976 F.2d at 717-18 (addressing whether topcoats applied to automobiles were incidental to assembly process). *Haggar* had nothing to do with painting processes. Furthermore, in *Haggar II*, the Court of Appeals did not reject all of its previous jurisprudence on the meaning of "incidental to the assembly process." Rather, it noted the "exemplars" in the statute and observed:

> Customs has decided that some kinds of painting are "incidental," and others are not, the distinction in the regulation being whether the paint operation is primarily for preservative or for decorative purposes. *Compare, e.g.*, 19 C.F.R. § 10.16(b)(3) (listing "[a]pplication of preservative paint or coating, including preservative metallic coating . . ." as incidental to the assembly process) *with* 19 C.F.R. § 10.16(c)(3) (listing "[p]ainting primarily intended to enhance the appearance of an article or impart distinctive features or characteristics" as *not* incidental to the assembly process).

*Haggar II*, No. 97-1002, 2000 WL 1035747, at *4.

While this implicit approval of the regulation as to painting might be *dicta*, the court has a difficult time rejecting a statement that is in the very opinion that was required to apply the Supreme Court's statements in *Haggar*. Further, although Customs' "categorical approach" was approved in both *Haggar* cases, Customs is not forbidden by either *Haggar* case from prescribing additional general qualitative tests, as it does in the regulation.

The court has already noted that a general qualitative limitation of "incidental to the assembly process" is found in the relevant legisla-

tive history. The regulation reasonably adopts this approach. It is true that general qualitative terms such as "minor," or "significant," a regulatory term, are difficult to assess. Presumably this is why Customs has tried to define them by identifying categories of incidental or not incidental operations, where possible. Nevertheless, Customs cannot foresee every circumstance, and it is forced also to employ general qualitative terms, as it does in 19 C.F.R. § 10.16(c)(3) & (5). This is consistent with the *GM* view of the essential meaning of "incidental to the assembly process." *GM*, 976 F.2d at 720. Thus, if *GM* still has any force, the regulations carry out what remains of it.

The next question is, assuming *arguendo* that "painting" has an unambiguous meaning in the statute, does that unambiguous meaning of painting embrace what is at issue here so as to prevent the application of the regulation? To answer this question the court notes how it described in *Chrysler* the Mexican operations on the sheet metal components imported from the United States.

> In the initial stages of assembly, sheet metal components are welded together in the body shop. A metal finishing operation takes place to locate and detect any defects and to prepare the body for painting. The parties disagree as to whether metal finishing is part of the painting process. Although it appears more closely related to the painting process, resolution of this matter is not dispositive. The disputed processes all occur in connection with the paint operation. This begins with cleaning, a phosphate application to prepare the metal body for primer, some sealing, anti-chip coating application, baking, application of one or two color coats and a clear coat, followed by more baking.

*Chrysler*, 19 CIT at 354 (footnote omitted). Because there was no description in *Haggar* of "painting," one cannot be sure whether the Supreme Court would find that the term "painting" in the statute means either all of the operations that are arguably part of the painting process in this case, or those which might come within a broad definition of the term "painting."

Accordingly, the court concludes, as apparently the appellate court did in *Haggar II*, that there is room for the operation of the Customs' regulation as to painting operations or processes. That regulation is now the focus of the court's inquiry, as it was not in *Chrysler*.

II. The court's decision in *Chrysler* does not resolve the issue of the application of 19 C.F.R. § 10.16 to this case.

19 C.F.R. § 10.16(b) recognizes "application of preservative paint or coating, including preservative metallic coating, lubricants, or protective encapsulation" as an operation "incidental to the assembly process." Section 10.16(c), however, prohibits any "significant process, operation, or treatment . . . whose primary purpose is the . . . completion [or] physical or chemical improvement of a component" from qualifying as "incidental to the assembly process." 19 C.F.R. §

10.16(c). It goes on to include "[p]ainting primarily intended to enhance the appearance of an article or to impart distinctive features or characteristics" as non-qualifying. 19 C.F.R. § 10.16(c)(3). It also regards as non-qualifying any operation which "imparts significant new characteristics or qualities to the article affected." 19 C.F.R. § 10.16(c)(5).

The court in *Chrysler* was not required to apply the regulation because the *GM* case had resolved the issue without regard to the regulation. The court did opine that, of the paint process as a whole, 70% was primarily for preservative purposes, and as to the top coats it was "impossible to separate their appearance-enhancing features from their preservative functions." *Chrysler*, 19 CIT at 355. The parties now seem to agree that all of the steps prior to top-coating are preservative and would not render the sheet metal parts dutiable. The dispute is now expressly limited to the status of the top-coating processes.

The court in *Chrysler* did not restrict its analysis to top-coating. Nor, as indicated, is the legal context the same as it was in *Chrysler*. If the facts of this case turn out to be as they were in *Chrysler,* the court would have to address the legal issue of whether a process that is neither primarily preservative nor primarily appearance enhancing falls into § 10.16(b), "incidental," or § 10.16(c) "not incidental," or whether the top coats by themselves impart "significant new characteristics . . . to the article affected. 19 U.S.C. § 10.16(c)(5).

The court declines to decide these issues in a vacuum. The facts of this case may not be exactly as they were in *Chrysler*. Either party may choose to put on different evidence which might resolve the issue more clearly. *See United States v. Stone & Downer Co.*, 274 U.S. 225, 236-7 (1927) (judgment as to classification of one entry is not *res judicata* as to another). While *stare decisis* applies, there are exceptions to its application. *See Schott Optical Glass v. United States*, 750 F.2d 62, 64 (Fed. Cir. 1984) (evidence may demonstrate decision was clearly erroneous). *See also J.E. Bernard & Co.*, 66 Cust. Ct., 545, 552, 324 F. Supp. 496, 502-3 (1971) (in reappraisement case, estoppel applied where matters in prior case were static, factually and legally). Because of the change in the legal climate, the parties will be allowed to offer new evidence, although such evidence may be limited as befits the previous history of this matter. Accordingly, summary judgment is denied. The parties shall submit a proposed Rule 16 order within eleven days.

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

---

This is to advise that on October 2, 2000

Judge Evan J. Wallach

Issued CONFIDENTIAL Slip-Opinion 00-125

In action

Ct. No. 99-06-00363

Acciai Speciali Terni S.p.A.
Acciai Speciali Termi USA
(Plaintiff)

v.

United States
(Defendant)

Allegheny Ludlum Corp., et al.,
(Defendant-Intervenor)

A PUBLIC VERSION WILL BE FORWARDED TO YOU WHEN MADE AVAILABLE

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

This is to advise that on October 5, 2000

Judge Evan J. Wallach

Issued CONFIDENTIAL Slip-Opinion 00-126

In action

Ct. No. 98-04-00886

Mannesmannrohren-Werke AG and
Mannessmann Pipe and Steel Corporation,
(Plaintiff)

v.

United States
(Defendant)

Gulf State Tube Division of
Vision Metals,
(Defendant-Intervenor)

A PUBLIC VERSION WILL BE FORWARDED TO YOU
WHEN MADE AVAILABLE

---

NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made

by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

---

(Slip Op. 00-127)

JUDGEMENT

MBR INDUSTRIES, INC., PLAINTIFF, *v.* THE UNITED STATES, DEFENDANT

Court No. 99-05-00260

JANE A. RESTANI, *Judge*

This action is dismissed without prejudice to reinstatement, as plaintiff has not demonstrated that it has suffered any redressable harm from the suspension of past drawback privileges, to wit: exporter's summary procedure, accelerated payments and waiver of prior notice of intent to export.

Prior to seeking any reinstatement plaintiff must meet with defendant to discuss settlement. In this matter is not settled plaintiff shall include with its motion for reinstatement a short and concise statement as to why it cannot regain its privileges as to the future by filing a new application and why it seeks retroactive restoration of its privileges. If monetary loss is an issue, it shall list the drawback claims or entries at issue and the amounts sought to be recovered. On the face of the filings to date no justiciable case or controversy has been demonstrated.

## NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

---

(Slip Op. 00-128)

SKF USA INC., SKF FRANCE S. A. AND SARMA, PLAINTIFFS AND DEFENDANT-INTERVENORS, *v.* UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY AND SNR ROULEMENTS, DEFENDANT-INTERVENORS AND PLAINTIFFS

Consol. Court No.: 97-02-00269-S1

Plaintiffs and defendant-intervenors, SKF USA Inc., SKF France S.A. and Sarma (collectively "SKF") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 62 Fed. Reg. 2081 (Jan. 15, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, and Singapore; Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 14,391 (Mar. 26, 1997). Defendant-intervenors and plaintiffs, The Torrington Company ("Torrington") and SNR Roulements ("SNR") also move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of Commerce's *Final Results*.

Specifically, SKF argues that Commerce erred in: (1)calculating constructed value ("CV") profit; (2) calculating the CV home market credit expense rate based on home market gross unit price while applying that rate to the per unit cost of production; (3) including SKF's zero-value United States transactions in its margin calculations; (4) failing to match United States sales to similar home market sales prior to resorting to CV when all home market sales of identical merchandise have been disregarded; and (5) committing a computer error that resulted in the assignment of an incorrect level of trade ("LOT") code to certain United States sales.

Torrington contends that Commerce erred in accepting SKF's home-market billing adjustments because: (1) they were reported on a customer-specific rather than on a transaction-specific basis; and (2) the data is incomplete.

SNR argues that Commerce erred in: (1) calculating CV profit; and (2) deducting home market depreciation expenses as United States indirect selling expenses when calculating constructed export price ("CEP").

Held: SKF's USCIT R. 56.2 motion is denied in part and granted in part. Torrington's USCIT R. 56.2 motion is denied in part and granted in part. SNR's USCIT R. 56.2 motion is denied in part and granted in part. The case is remanded to Commerce to: (1) reconsider its decision to calculate SKF's home market credit expense based upon price and then apply that rate to cost; (2) exclude any transactions that were not supported by consideration from SKF's United States sales database and to adjust the dumping margins accordingly; (3) first attempt to match SKF's United States sales to similar home market sales before resorting to CV; (4) assign the correct LOT code for SKF's export price sales in the margin calculation program; (5) determine whether SKF-France's billing adjustment two is insignificant within the meaning of 19 U.S.C. § 1677f-1(a) (1994); and (6) reconsider the treatment of depreciation expenses incurred in France in calculating CEP for SNR. Commerce is affirmed in all other respects.

[SKF's motion is denied in part and granted in part. Torrington's motion is denied in part and granted in part. SNR's motion is denied in part and granted in part. Case remanded.]

(Dated: October 11, 2000)

*Steptoe & Johnson LLP* (*Herbert C. Shelley* and *Alice A. Kipel*) for SKF.

*David W. Ogden*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*, Assistant Director); of counsel: *Mark A. Barnett*, *Thomas H. Fine*, *Patrick V. Gallagher* and *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

*Stewart and Stewart* (*Terence P. Stewart*, *Wesley K. Caine*, *Geert De Prest* and *Lane S. Hurewitz*) for Torrington.

*Grunfeld, Desiderio, Lebowitz & Silverman LLP*(*Bruce M. Mitchell* and *Jeffrey S. Grimson*) for SNR.

## OPINION

TSOUCALAS, *Senior Judge*: Plaintiffs and defendant-intervenors, SKF USA Inc., SKF France S.A. and Sarma (collectively "SKF") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Singapore, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews*("*Final Results*"), 62 Fed. Reg. 2081 (Jan. 15, 1997), as amended, *Antifriction Bearings (Other Than Tapered*

*Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, and Singapore; Amended Final Results of Antidumping Duty Administrative Reviews* ("*Amended Final Results*"), 62 Fed. Reg. 14,391 (Mar. 26, 1997). Defendant-intervenors and plaintiffs, The Torrington Company ("Torrington") and SNR Roulements ("SNR") also move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging certain aspects of Commerce's *Final Results.*

Specifically, SKF argues that Commerce erred in: (1) calculating constructed value ("CV") profit; (2) calculating the CV home market credit expense rate based on home market gross unit price while applying that rate to the per unit cost of production ("COP"); (3) including SKF's zero-value United States transactions in its margin calculations; (4) failing to match United States sales to similar home market sales prior to resorting to CV when all home market sales of identical merchandise have been disregarded; and (5) committing a computer error that resulted in the assignment of an incorrect level of trade ("LOT") code to certain United States sales.

Torrington contends that Commerce erred in accepting SKF's home-market billing adjustments because: (1) they were reported on a customer-specific rather than on a transaction-specific basis; and (2) the data is incomplete.

SNR argues that Commerce erred in: (1) calculating CV profit; and (2) deducting home market depreciation expenses as United States indirect selling expenses when calculating constructed export price ("CEP").

## BACKGROUND

This case concerns the sixth review of the antidumping duty order on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported to the United States from France during the review period of May 1, 1994 through April 30, 1995.[1] On July 8, 1996, Commerce published the preliminary results of the subject review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Thailand and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews, Termination of Administrative Reviews, and Partial Termination of Administrative Reviews* ("*Preliminary Results*"), 61 Fed. Reg. 35,713. Commerce issued the *Final Results* on January 15, 1997, see 62 Fed. Reg. 2081, and the *Amended Final Results* on March 26, 1997, see 62 Fed. Reg. 14,391.

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

---

[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law is the antidumping statute as amended by the Uruguay Round Agreements Act ("URAA"), Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective January 1, 1995). *See Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed. Cir. 1995) (citing URAA § 291(a)(2), (b) (noting effective date of URAA amendments)).

STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of America v. United States*, 24 CIT ___, ___, 104 F. Supp. 2d 110, 115-16 (2000) (detailing Court's standard of review in antidumping proceedings).

DISCUSSION

I. *Commerce's CV Profit Calculation*

A. *Background*

For this POR, Commerce used CV as the basis for normal value ("NV") "when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 61 Fed. Reg. at 35,718. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A) (1994). *See Final Results*, 62 Fed. Reg. at 2113. Specifically, in calculating CV, the statutorily preferred method is to calculate an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . in connection with the production and sale of a foreign like product [made] in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A).

In applying the preferred methodology for calculating CV profit, Commerce determined that "the use of aggregate data that encompasses all foreign like products under consideration for NV represents a reasonable interpretation of [§ 1677b(e)(2)(A)] and results in a practical measure of profit that [Commerce] can apply consistently in each case." *Final Results*, 62 Fed. Reg at 2113. Also, in calculating CV profit under § 1677b(e)(2)(A), Commerce excluded below-cost sales from the calculation which it disregarded in the determination of NV pursuant to § 1677b(b)(1) (1994). *See id.* at 2114.

B. *Contentions of the Parties*

SKF and SNR contend that Commerce's use of aggregate data encompassing all foreign like products under consideration for NV in calculating CV profit is contrary to § 1677b(e)(2)(A). *See* SKF's Br. Supp. Mot. J. Agency R. ("SKF's Br.") at 11-26; SNR's Br. Supp. Mot. J. Agency R. ("SNR's Br.") at 7-12. Instead, SKF and SNR claim that Commerce should have relied on the alternative methodology of § 1677b(e)(2)(B)(i), which provides a CV profit calculation that is similar to the one Commerce used, but does not limit the calculation to sales made in the ordinary course of trade, that is, below-cost sales are not excluded from the calculation. *See* SKF's Br. at 11-26; SNR's Br. at 12-13. SKF also asserts that if Commerce's exclusion of below-cost sales from the numerator of the CV profit calculation is lawful, Commerce should nonetheless include such sales in the denominator of the cal-

culation to temper bias which is inherent in the agency's dumping margin calculations. *See* SKF's Br. at 26-30.

Commerce responds that it properly calculated CV profit pursuant to § 1677b(e)(2)(A) based on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Mem. in Partial Opp'n to Pls.' Mots. J. Agency R. ("Def.'s Mem.") at 8-11. Consequently, Commerce maintains that since it properly calculated CV profit under subparagraph (A) rather than (B) of § 1677b(e)(2), it correctly excluded below-cost sales from the CV profit calculation. *See id.* at 12-19. Torrington generally agrees with Commerce's contentions. See Torrington's Resp. to Pls.' Mots. J. Agency R. ("Torrington's Resp.") at 6-15.

C. *Analysis*

In *RHP Bearings Ltd. v. United States*, 23 CIT ___, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at ___, 83 F. Supp. 2d at 1336. Since Commerce's CV profit methodology and SKF and SNR's arguments at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings*. The Court, therefore, finds that Commerce's CV profit methodology is in accordance with law.

Moreover, since (1) § 1677b(e)(2)(A) requires Commerce to use the actual amount for profit in connection with the production and sale of a foreign like product in the ordinary?Consol. Court No. 97-02-00269-S1 Page 10 course of trade, and (2) 19 U.S.C. § 1677(15) (1994) provides that below-cost sales disregarded under § 1677b(b)(1) are considered to be outside the ordinary course of trade, the Court finds that Commerce properly excluded below-cost sales from the CV profit calculation.

II. *CV Home Market Credit Expense Rate*

A. *Contentions of the Parties*

SKF contends that Commerce erred in "calculating a home market credit expense rate based on price, but applying that rate to cost." *See* SKF's Br. at 30. Specifically, Commerce "computed a credit expense rate based on the ratio of home market credit expense to home market gross unit price" when "calculating an average home market credit expense to be deducted from CV." *Id.* Commerce applied the home market credit expense rate to the COP, rather than price, of each model to derive a per unit amount for home market credit expense. *See id.* Commerce then deducted the per unit expense amount in the CV calculation. *See id.* SKF maintains that applying a home market credit expense rate based upon price to cost is contrary to the "fundamental principle inherent in all antidumping rate and factor calculations, that the calculation of the rate and its application must be consistent." SKF's Reply Supp. Mot. J. Agency R. ("SKF's Reply") at 21.

Commerce agrees that it erred "by calculating a home market credit expense based upon price but applying that rate to cost," and asks the Court to remand the matter for recalculation of SKF's home market credit cost. Def.'s Mem. at 26. Torrington, however, maintains that Commerce's methodology is reasonable and should be affirmed. *See* Torrington's Resp. at 26.

In light of the foregoing, the Court remands this issue to Commerce to reconsider its decision to calculate home market credit expense based upon price and then apply that rate to cost.

III. *Zero-Value United States Transactions*

A. *Contentions of the Parties*

SKF argues that in light of *NSK Ltd. v. United States*, 115 F.3d 965, 975 (Fed. Cir. 1997), the Court should remand the matter to Commerce to exclude SKF's zero-value transactions from its margin calculations. *See* SKF's Br. at 35-36. SKF maintains that United States transactions at zero value, such as prototypes and samples, do not constitute true sales and, therefore, should be excluded from the margin calculations pursuant to *NSK*. *See id.* at 36. The identical issue was decided by this Court in *SKF USA Inc. v. United States*, 23 CIT ___, Slip Op. 99-56, 1999 WL 486537 (June 29, 1999).

Torrington concedes that a remand may be necessary in light of *NSK*, but argues that further factual inquiry by Commerce is necessary to determine whether the zero-price transactions were truly without consideration. *See* Torrington's Resp. at 28. Torrington argues that only if the transactions are truly without consideration can they fall within *NSK*'s exclusion. *See id.* at 12.

Commerce concedes that the case should be remanded to it to exclude the sample transactions for which SKF received no consideration from SKF's United States sales database. *See* Def.'s Mem. at 26.

Commerce is required to impose antidumping duties upon merchandise that "is being, or is likely to be, sold in the United States at less than its fair value." 19 U.S.C. § 1673(1) (1994). A zero-priced transaction does not qualify as a "sale" and, therefore, by definition cannot be included in Commerce's foreign market value] calculation. *See NSK*, 115 F.3d at 975 (holding "that the term sold . . . requires both a transfer of ownership to an unrelated party and consideration"). Thus, the distribution of AFBs for no consideration falls outside the purview of 19 U.S.C. § 1673. Consequently, the Court remands to Commerce to exclude any transactions that were not supported by consideration from SKF's United States sales database and to adjust the dumping margins accordingly.

IV. *Commerce's Matching United States Sales to Similar Home Market Sales Prior to Resorting to CV*

SKF maintains that Commerce erred in resorting to CV without first attempting to match United States sales, that is, export price ("EP") or CEP sales, to similar home market sales in instances where

home market sales of identical merchandise have been disregarded because they were out of the ordinary course of trade. *See* SKF's Br. at 38-39. SKF maintains that a remand is necessary to bring Commerce's practice in line with the United States Court of Appeals for the Federal Circuit's ("CAFC") decision in *Cemex, S.A. v. United States*, 133 F.3d 897, 904 (Fed. Cir. 1998). Commerce agrees with SKF. *See* Def.'s Mem. at 27.

The Court agrees with SKF and Commerce. In *Cemex*, the CAFC reversed Commerce's practice of matching a United States sale to CV when the identical or most similar home market model failed the cost test. *See* 133 F.3d at 904. The CAFC stated that "[t]he plain language of the statute requires Commerce to base foreign market value [(now NV)] on nonidentical but similar merchandise [(foreign like product under the amendments to the Uruguay Round Agreements Act)] . . . rather than [CV] when sales of identical merchandise have been found to be outside the ordinary course of trade." *Id.* In light of *Cemex*, this matter is remanded so that Commerce can first attempt to match United States sales to similar home market sales before resorting to CV.

V. *Commerce's Computer Error*

A. *Contentions of the Parties*

SKF argues that Commerce assigned sales to large industrial users an LOT code "2," but then incorrectly coded the EP sales made by SKF France under an LOT code "3" in the *Final Results* and *Amended Final Results*. *See* SKF's Br. at 40.

Commerce reviewed SKF's allegation and agrees that certain EP sales were erroneously coded as to their LOT. *See* Def.'s Mem. at 28. Commerce asks the Court to remand the case so that Commerce can assign the correct LOT code for SKF's EP sales in the margin calculation program. *See id.* Torrington takes no position on this issue. *See* Torrington's Resp. at 4.

Upon review of the record, the Court agrees with SKF and Commerce that the EP sales made by SKF France were incorrectly coded. The Court, therefore, remands this issue to Commerce to assign the correct LOT code for SKF's EP sales in the margin calculation program.

VI. *Commerce's Treatment of SKF's Home Market Billing Adjustments as Direct Price Adjustments to NV*

A. *Background*

SKF reported home market billing adjustment two ("BILLAD2") for sales made by its Austrian affiliate, Steyr Walzlager, in the home market of France. *See* SKF's Resp. Sec. B Questionnaire (Sept. 26, 1995) (Case No. A-427-801) at B-2. BILLAD2 represents billing adjustments not associated with a specific transaction. *See id.* at B-25 to B-26. SKF explained that BILLAD2 included multiple invoices, multiple products or multiple product lines and could not be properly tied to a single transaction. *See id.* SKF, therefore, used customer-specific al-

locations to report these adjustments. In reporting BILLAD2, SKF took the sum of all the adjustments for a particular customer number, divided the totals by total gross sales to that customer number and applied the resulting factor "to each reported sale made to that customer number by multiplying the per unit invoice price by the customer-specific billing adjustment factor for the relevant period." *Id.*

Commerce accepted SKF's BILLAD2 as a direct adjustment to price after determining that SKF acted to the best of its ability in reporting the adjustment on a sale-specific basis and that its reporting methodology was "not unreasonably distortive." *Final Results*, 62 Fed. Reg. at 2090. Commerce found that SKF's billing adjustments could not be tied to a single specific transaction because they "relate to multiple invoices or multiple invoice lines." *Id.* at 2095. Although it prefers transaction-specific reporting, Commerce realizes that such reporting is not always feasible, particularly given the "non-transaction-specific nature of the expense, the volume of [home market] transactions reported by SKF, and the time constraints imposed by the statutory deadlines." *Id.*

Furthermore, Commerce determined that even though SKF included out-of-scope merchandise in the allocation of the adjustment, the methodology was "not unreasonably distortive" since there existed "no reason to believe that such adjustments were not granted in proportionate amounts with respect to sales of out-of-scope and in-scope merchandise." *Id.*

B. *Contentions of the Parties*

Torrington argues that SFK failed to show that all reported BILLAD2 values directly relate to the relevant sales. *See* Torrington's Br. at 5. Torrington maintains that the CAFC has clearly defined "direct" adjustments to price as those that "vary with the quantity sold, or that are related to a particular sale," and Commerce cannot treat adjustments that do not meet this definition as direct. *Id.* at 11 (citing *Torrington Co. v. United States* ("*Torrington CAFC*"), 82 F.3d 1039, 1050 (Fed. Cir. 1996) (citations omitted)). Torrington contends that here Commerce "redefined 'direct' to achieve what *Torrington CAFC* had previously disallowed" by allowing SKF to report allocated post-sale price adjustments ("PSPAs") if it acted to the best of its abilities in light of its record-keeping systems and the results were not unreasonably distortive. Id. at 13.

Furthermore, Torrington maintains that the amendments to the Uruguay Round Agreements Act ("URAA") did not modify the distinction between direct and indirect adjustments established under pre-URAA law such as *Torrington CAFC*. *See id.* at 14 (citing 19 U.S.C. § 1677a(d)(1)(B), (D) (1994) and § 1677b(a)(7)(B) (1994)). Torrington is

not convinced that the Statement of Administrative Action[2] ("SAA") accompanying the URAA contradicts its contentions. *See id.* at 15 (citing SAA at 823-24). Additionally, Torrington acknowledges that the antidumping regulations that came into effect on July 1, 1997 do not apply to this review but maintains that they support its position. *See id.* at 15-16 (citing *Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27,296, 27,416-17 (May 19, 1997)).

Torrington acknowledges that this Court has already approved of Commerce's practice as applied under post-URAA law in *Timken Co. v. United States* ("*Timken*"), 22 CIT ___, 16 F. Supp. 2d 1102 (1998), but asks the Court to reconsider its approval. *See* Torrington's Reply in Supp. Mot. J. Agency R. ("Torrington's Reply") at 6-7. Torrington complains that *Timken* erroneously held that 19 U.S.C. § 1677m(e) (1994) shifts the burden of proof away from the party who stands to benefit from the claim made, here, SKF. *See id.*

Torrington also contends that even under its new methodology, Commerce's determination was not supported by substantial evidence inasmuch as SKF failed to show that (1) its reporting method did not result in distortion; and (2) it put forth its best efforts to report the information on a more precise basis. *See* Torrington's Br. at 21. Torrington emphasizes that SKF has the burden of showing non-distortion and best efforts, and having failed to do so, must not benefit from the adjustment. *See id.* at 21-22. Torrington, therefore, requests that this Court reverse Commerce's determination with respect to BILLAD2 and remand the case to Commerce with instructions to disallow SKF's downward home market billing adjustments, but allow all upward home market billing adjustments in calculating NV. *See id.* at 27.

Commerce responds that Torrington erred in relying on *Torrington CAFC* because the case does not stand for the proposition that direct price adjustments may only be accepted when they are reported on a transaction-specific basis. *See* Def.'s Mem. at 42. Rather, the *Torrington CAFC* court "merely overturned a prior Commerce practice . . . of treat[ing] certain allocated price adjustments as indirect expenses," *id.* at 42-43 (citing *Torrington CAFC*, 82 F.3d at 1047-51), and does "not address the propriety of the allocation methods" used in reporting the price adjustments in question, *id.* at 43 (quoting *Final Results*, 62 Fed. Reg. at 2091). Also, contrary to Torrington's assertion, Commerce did not consider *Torrington CAFC* as addressing proper allocation methodologies; rather, Commerce, only viewed *Torrington CAFC* as holding that "Commerce could not treat as indirect selling expenses 'improperly' allocated price adjustments." *Id.* at 44. Com-

---

[2] The Statement of Administrative Action ("SAA") represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

merce notes that pursuant to its new methodology, it does not consider price adjustments to be any type of selling expense, either direct or indirect, and, therefore, Torrington's argument is not only without support, but also inapposite to *Torrington CAFC*. *See id.* at 45. Moreover, Commerce asserts that this Court in *Timken* approved of Commerce's modified methodology of accepting respondents' claims for discounts, rebates and other billing adjustments as direct price adjustments, where this Court found the methodology to be consistent with requisites of 19 U.S.C. § 1677m(e). *See id.* at 45-46 (citing *Timken*, 16 F. Supp. 2d at 1108).

Commerce also argues that its treatment of SKF's reported home market billing adjustments was supported by substantial record evidence and otherwise in accordance with law because it is consistent with *Timken*, that is, Commerce: (1) "used its acquired knowledge of the respondents' computer systems and databases to conclude that information . . . could not be provided in the preferred form"; and (2) "scrutinized the respondents' data before concluding that the data were reliable"; and (3) found "that the adjustments on scope and non-scope merchandise did not result in unreasonable distortions." *Id.* at 48.

Additionally, Commerce argues that its findings are supported by substantial evidence. *See id.* at 47. Specifically, Commerce maintains that SKF "had reported the adjustment on the most specific basis possible and, thus, had cooperated to the best of its ability." *Id.* at 48. Commerce noted that "given the similarity between the value, physical characteristics and manner of sales between SKF's in-scope and out-of-scope merchandise, Commerce found no evidence which would lead it to suspect" that the allocation methodology was unreasonably distortive, that is, SKF did not favor out-of-scope merchandise over in-scope merchandise. *Id.* at 48-49.

Commerce maintains that Torrington is mistaken in its contention that SKF failed to substantiate that it acted to the best of its ability to report the adjustment on a transaction-specific basis. *See id.* at 50-51. Commerce noted that the adjustment related to an "extremely small volume of merchandise and to very few customers." *Id.* at 49 (citing SKF's Resp. Sec. B Questionnaire (Sept. 26, 1995) (Case No. A-427-801)). For example, in 1994, SKF's total reported BILLAD2 totaled approximately $1,133.00, and in 1995, it amounted to $69.00, while the total sales of subject merchandise for the period of review was approximately $65,000,000.00. *See id.* at 49-50 (citing SKF's Resp. Sec. A Questionnaire (Sept. 26, 1995) (Case No. A-427-801)). Commerce argues that "[g]iven the insignificance of this adjustment in light of the enormous size of SKF's home market database, Commerce was more than reasonable in concluding that SKF acted to the best of its ability in allocating this adjustment" on a customer-specific basis "rather than seeking to trace specific invoices or groups of invoices." *Id.* at 50.

SKF concurs with Commerce's position. SKF contends that in *Timken* this Court properly stated that "'[n]either the pre-URAA nor

the newly-amended statutory language imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments to NV for PSPAs.'" SKF's Resp. Torrington's Mot. J. Agency R. ("SKF's Resp.") at 17. SKF contends that the holding of *Torrington CAFC* does not answer the issue in the instant case and, moreover, that case was decided under pre-URAA law. *See id.* at 6. Furthermore, SKF argues that subsequent changes in the law, that is, § 1677m(e) and the SAA, support its position and cannot be ignored. See id. at 14-16.

SKF also contends that substantial record evidence supports Commerce's conclusions. *See id.* at 19. SKF maintains that the record demonstrates that Commerce had extensive knowledge and experience with BILLAD2 and properly drew on its knowledge in accepting SKF's methodology. *See id.* at 20. With respect to Torrington's argument that SKF failed to demonstrate that it acted to the best of its ability in providing the information in the preferred form, SKF responds by arguing that Commerce "has determined that, by their nature, these adjustments cannot be reported more specifically." *Id.* at 20-21.

SKF contends that its inability to report the adjustments on a more specific basis results from the nature of the adjustment and, moreover, it would be unreasonable to expect SKF to alter its dealings with its customers to fit Torrington's conception of the antidumping reporting requirements. *See id.* at 21. Finally, SKF argues that the same methodology used in the subject review was used in other reviews where no distortion was found and, furthermore, there is no evidence of distortion in the subject review. *See id.* at 22-23.

C. *Analysis*

The Court notes that this issue has been decided in *Torrington Co. v. United States* ("*Torrington CIT*"), 24 CIT ___, 100 F. Supp. 2d 1102 (2000), *Timken* and, most recently, *NTN Bearing*, 24 CIT at ___, 104 F. Supp. 2d at 149-57. The Court adheres to its previous decisions, applying the analysis in *NTN Bearing* to the instant case.

The Court disagrees with Torrington that *Torrington CAFC* dictates that direct price adjustments may only be accepted when they are reported on a transaction-specific basis. Rather, as Commerce correctly stated, the Court notes that *Torrington CAFC* does "not address the propriety of allocation methods" but rather holds that Commerce may not treat direct price adjustments as if they were indirect selling expenses. *Final Results*, 62 Fed. Reg. 2091. The Court further notes that *Torrington CAFC* was decided under pre-URAA law, that is, it did not take into consideration the new statutory guidelines of 19 U.S.C. § 1677m(e). Moreover, the Court acknowledged in *Timken* that although (1) "Commerce treated rebates and billing adjustments as selling expenses in preceding reviews under pre-URAA law," and (2) "previously decided that such adjustments are selling expenses and, therefore, should not be treated as adjustments to price,"

the Court nevertheless determined that this did not "preclude Commerce's change in policy or this Court's reconsideration of its stance in light of the newly-amended antidumping statute [(that is, 19 U.S.C. § 1677m(e))]." 16 F. Supp. 2d at 1107.

Indeed, the Court approved in *Timken* Commerce's modified methodology of accepting claims for discounts, rebates and other billing adjustments as direct price adjustments to NV, *see id.* at 1107-08, and reaffirmed its decision in *Torrington CIT*. Specifically, in *Timken*, the Court reasoned that "[n]either the pre-URAA nor the newly-amended statutory language imposes standards establishing the circumstances under which Commerce is to grant or deny adjustments to NV for PSPAs." 16 F. Supp. 2d at 1108 (citing *Torrington CAFC*, 82 F.3d at 1048). The Court, however, noted that 19 U.S.C. § 1677m(e) "specifically directs that Commerce shall not decline to consider an interested party's submitted information if that information is necessary to the determination but does not meet all of Commerce's established requirements, if the [statute's] criteria are met." *Id.* The Court, therefore, approved of Commerce's change in methodology, "as it substitutes a rigid rule with a more reasonable method that nonetheless ensures that a respondent's information is reliable and verifiable. This is especially true in light of the more lenient statutory instructions of subsection 1677m(e)." *Id.*

Accordingly, the Court in *Timken* upheld Commerce's decision to accept Koyo's billing adjustments and rebates, "even though they were not reported on a transaction-specific basis and even though the allocations Koyo used included rebates on non-scope merchandise." *See id.* at 1106. Similarly, in *Torrington CIT*, the Court followed the rationale of *Timken* and upheld Commerce's determination to accept respondents' rebates even though they were reported on a customer-specific rather than transaction-specific basis and even though the allocation methodology used included rebates on non-scope merchandise. *See* 24 CIT at __, 100 F. Supp. 2d at 1107-08.

The Court finds that Commerce's decision to accept SKF's reported home market billing adjustments was supported by substantial evidence and was fully in accordance with the post-URAA statutory language and the SAA's statements. The record indicates that Commerce properly used its acquired knowledge of SKF's billing practices to conclude that it could not provide the information in the preferred form and, moreover, properly scrutinized SKF's reported billing adjustments before concluding that the adjustments were reliable. *See Final Results*, 62 Fed. Reg. at 2095. Commerce also properly accepted SKF's allocation methodology even though the adjustments related to multiple invoices, products or product lines since there was no evidence "that such adjustments were not granted in proportionate amounts with respect to sales of out-of-scope and in-scope merchandise," indicating that the allocations were not unreasonably distortive. *Id.*

Moreover, the record and the *Final Results* demonstrate that the requirements of 19 U.S.C. § 1677m(e), as noted earlier, were satisfied

by the respondents. First, SKF's reported adjustments were submitted in a timely fashion. *See* § 1677m(e)(1). Second, the information SKF submitted was verifiable, as shown in other reviews that utilized the identical treatment of BILLAD2. *See* § 1677m(e)(2). Third, SKF's information was not so incomplete that it could not serve as a basis for reaching a determination. *See* § 1677m(e)(3). Fourth, SKF demonstrated that it acted to the best of its abilities in providing the information and meeting Commerce's new reporting requirements. See § 1677m(e)(4). Finally, the Court finds that there was no indication that the information was incapable of being used without undue difficulties. *See* § 1677m(e)(5).

Commerce's determination with respect to SKF was also consistent with the SAA. The Court agrees with Commerce's finding in the *Final Results* that given the non-transaction-specific nature of BILLAD2, the extremely large volume of transactions and the time constraints imposed by the statute, SKF's reporting and allocation methodologies were reasonable. This is consistent with the SAA directive under § 1677m(e), which provides that Commerce "may take into account the circumstances of the party, including (but not limited to) the party's size, its accounting systems, and computer capabilities." SAA at 865. Thus, the Court finds that Commerce properly considered the ability of SKF to report BILLAD2 on a more specific basis.

Accordingly, the Court concludes that Commerce's acceptance of SKF's reported billing adjustments as direct adjustments to NV is supported by substantial evidence and fully in accordance with law.

## VII. *Commerce's Treatment of Home Market Billing Adjustments With Respect to Sales Made by SKF-France*

### A. *Background and contentions of the parties*

SKF designated as billing adjustment one those billing adjustments "greater than five percent of the gross unit price of the sale on which they were granted" or those "greater than [1,000 French Francs ("FF")] (about $167.00), whichever was less. Def.'s Mem. at 51 (citing SKF's Resp. Sec. B Questionnaire (Sept. 26, 1995) (Case No. A-427-801) at B-23, B-24). These adjustments were reported on a transaction-specific basis and, therefore, are not challenged by Torrington.

SKF designated as billing adjustment two those billing adjustments that were "less than FF 1,000 and were less than five percent of the value of the sale on which they were granted." *Id.* Because SKF found these adjustments comprised a very small part of its overall home market sales of subject merchandise, SKF simply reported them as zero. *See* SKF's Supplemental Resp. (Feb. 16, 1996) (Case No. A-427-801) at 36-37. SKF further maintained that its failure to report the actual amounts of the billing adjustment was detrimental to its own interest, as the total value of the adjustments would have increased NV and its dumping margin as well. *See id.*

In the *Final Results*, Commerce accepted SKF's practice of disregarding insignificant billing adjustment values. *See* 62 Fed. Reg. at

2095. Specifically, Commerce determined that "[t]here is nothing on the record to suggest that SKF's information is inaccurate" and, furthermore, "[t]his policy of disregarding insignificant adjustments is consistent with [Commerce's] policy in prior reviews." *Id.*

Commerce notes that although it had previously disapproved of SKF taking upon itself the determination of whether billing adjustments are insignificant, it permitted the practice in the fourth review "because independent information gathered at verification confirmed that the overall adjustments lowered foreign market value] and their omission was against SKF-France's interests." *See* Def.'s Mem. at 52 (citing *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation in Part of Antidumping Duty Orders*("fourth review"), 60 Fed. Reg. 10,900 (Feb. 28, 1995)). In its memorandum to the Court, however, Commerce argued contrary to its position in the *Final Results*, maintaining that the issue should be remanded for re-evaluation of its treatment of SKF's billing adjustment two. *See id.* at 51. Specifically, Commerce maintains that in the instant review, "SKF did not provide the necessary information to support its calculation of the relative size of the adjustments at issue and to permit Commerce to determine whether the insignificant adjustment provision, 19 C.F.R. § 353.59 (a), which authorizes Commerce to disregard insignificant adjustments, was applicable." *Id.* at 53. Commerce asks the issue to be remanded for SKF to support its calculation of the relative size of billing adjustment two so that Commerce may determine whether it is insignificant within the meaning of the applicable regulation, 19 C.F.R. § 353.59 (a) or for SKF to support its contention that the effect of billing adjustment two was a reduction of NV. *See id.*

Torrington concurs with Commerce's position. Torrington maintains SKF failed to substantiate its claim that the value of billing adjustment two was insignificant. *See* Torrington's Br. at 20. Additionally, Torrington maintains that the total net value of the adjustment is irrelevant as billing adjustments are invoice-specific and, therefore, can either increase or decrease the reported price of any home market price and affect nominal value. *See id.* Torrington claims "Commerce erred by relying on SKF's representations rather than basing its determination on record evidence" and, therefore, Commerce's determination was not supported by substantial evidence. *Id.* at 25.

SKF maintains that Commerce's decision in the *Final Results* is supported by substantial evidence. SKF notes that the identical methodology employed in the instant review was accepted in the fourth review where Commerce had specifically stated that it did not merely allow SKF to determine what constituted an insignificant adjustment, but had verified the adjustment. *See* SKF's Resp. at 34-35. SKF argues that in the instant review, it did not merely assert that certain billing adjustments were insignificant, but provided Commerce with specific calculations. *See* SKF's Resp. at 35 (citing SKF's Supplemental Resp. (Feb. 16, 1996) (Case No. A-427-801) at 36-37).

C. *Analysis*

In determining the EP (or CEP) under 19 U.S.C. § 1677a or NV under § 1677b, Commerce has the discretion to "decline to take into account adjustments which are insignificant in relation to the price or value of the merchandise." 19 U.S.C. § 1677f-1(a)(2) (1994). Thus, the statute plainly provides not only that Commerce is the appropriate authority to determine whether an adjustment is insignificant, but also that Commerce has the discretion to decide whether to disregard an insignificant adjustment.

SKF maintains Commerce properly determined that its calculation of the billing adjustment was supported by substantial evidence by accepting SKF's conclusion that such values were insignificant or would have resulted in a net reduction of NV. The Court, however, disagrees with SKF that Commerce's decision is supported by substantial evidence since the only data that SKF had provided to Commerce in the administrative proceedings is the following:

> Specifically, in this review, . . . [SKF France's billing adjustment 2] represented only [ ] in 1994 and [ ] in January-April 1995 of the total gross sales value for SKF France. Furthermore, not reporting these billing adjustments was detrimental to SKF France, as the total net value of billing adjustments would have decreased foreign market value. Under its regulations, [Commerce] may disregard as insignificant an adjustment which would have an *ad valorem* effect of less than 0.33%. 19 C.F.R. § 353.59(a). Thus, SKF France's unreported billing adjustments may properly be considered insignificant, and in fact *de minimis* under [Commerce's] regulations.

SKF's Supplemental Resp. (Feb. 16, 1996) (Case No. A-427-801) at 36. Thus, SKF merely concluded that billing adjustment two comprised a certain percentage of total gross sales value, but did not provide the underlying information to Commerce for it to determine whether the adjustment was indeed insignificant. Alternatively, SKF provided no information to support its contention that the total effect of the billing adjustment was a reduction of NV. SKF's failure to provide this information, therefore, renders Commerce's determination in the *Final Results* unsupported by substantial evidence.

SKF offers to this Court a worksheet entitled "SKF France Billing Adjustments Not Processed Analysis" that it claims to have prepared concurrently with its supplemental response to Commerce's questionnaire and maintains this information supports its conclusions. SKF's Reply at 28, Ex. 9. SKF concedes, however, that this information was never submitted to Commerce. *See id.* Commerce did not have this information before it when it made its determination and, therefore, could not have relied on it when it concluded that SKF's calculations were proper. This Court cannot uphold Commerce's January 15 th , 1997 determination on the basis of information upon which

Commerce did not rely, since it is well-settled case law that "[t]he scope of the record for purposes of judicial review is based upon information which was 'before the relevant decision-maker' and was presented and considered 'at the time the decision was rendered.'" *Beker Indus. Corp. v. United States*, 7 CIT 313, 315, 1984 WL 3727 (1984) (citing S. Rep. No. 96-249, 96 th Cong., 1 st Sess. 247-48 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 633-34); *Daido Corp. v. United States*, 18 CIT 1053, 1059-60, 869 F. Supp. 967, 973 (1994); *Neuweg Fertigung GmbH v. United States*, 16 CIT 724, 726-27, 797 F. Supp. 1020, 1022 (1992). Commerce did not have the opportunity to evaluate the information to determine whether it provided adequate support for SKF's calculations, and the Court will not usurp Commerce's function in this regard.

Accordingly, the Court remands this issue to Commerce to determine whether billing adjustment two is insignificant within the meaning of 19 U.S.C. § 1677f-1(a). Commerce is directed to consider whether the use of facts available pursuant to 19 U.S.C. § 1677e (1994) is warranted and must also consider its responsibilities under § 1677m(e).

VIII. *Deducting Home Market Depreciation Expenses as United States Indirect Selling Expenses When Calculating CEP*

A. *Contentions of the Parties*

SNR contends that during verification, Commerce erred in deducting from CEP home market depreciation expenses as United States indirect selling expenses after determining that "'SNR had allocated depreciation expenses to all sales but, in fact, [SNR] did not include them in the [indirect selling expense variable].'" SNR's Br. at 15 (quoting *Final Results*, 62 Fed. Reg. at 2105). SNR claims that there is "no basis for deducting the depreciation expense for office equipment" associated with the commercial department in France responsible for sales to subsidiaries since those expenses are not "'associated with economic activities in the United States.'" *See* SNR's Br. at 15-16.

SNR maintains that "the record shows that the depreciation expense attributable to subsidiary sales would have been an [indirect] export selling expense" and should have been disregarded as were the other indirect selling expenses. *Id.* at 17. SNR admits that the portion of the depreciation expenses allocated to its United States sales to its United States affiliate should have been reported in the variable designating indirect selling expenses primarily composed of "personnel costs and commission paid on sales made to all SNR subsidiaries." *See* SNR's Br. at 13-15 (quoting SNR's Resp. Sec. C Questionnaire (Sept. 26, 1995) (Case No. A-427-801) at 34-35).

Torrington maintains that Commerce reasonably added an amount for depreciation to the United States indirect selling expenses reported by SNR. *See* Torrington's Resp. at 15. Torrington argues that in the *Final Results*, Commerce properly deducted depreciation expenses incurred in France from CEP pursuant to 19 U.S.C. § 1677a(d)(1). See id. at 16. Torrington claims that under the statutory

provision and proposed regulation, Commerce is required to deduct all expenses associated with economic activities in the United States, no matter where the expense was incurred. *See id.* Thus, Torrington argues that although the expense was incurred in France, it was properly deducted from CEP since some portion was allocable to SNR's United States sales. *See id.* at 17.

Commerce contends that the record is unclear on this issue and, therefore, "the case should be remanded to Commerce for reconsideration of the treatment of depreciation expenses incurred in France in calculating CEP for SNR." Def.'s Mem. at 54. In its reply to Commerce, SNR agreed that the Court should "remand the issue to allow Commerce to determine if it was appropriate to deduct from CEP depreciation expenses related to activities in the home market." SNR's Reply Br. Supp. Mot. J. Agency R. at 10.

B. *Analysis*

In the *Final Results*, Commerce simply stated the following:

> We agree with Torrington that SNR's depreciation expenses allocated to its [United States] sales should be part of [indirect selling expenses] we deduct from CEP. We verified SNR's response and, based on our findings at verification, we have made this deduction for our final results.

62 Fed. Reg. at 2105. Commerce did not state the basis for its conclusion that it was appropriate to deduct from CEP depreciation expenses related to activities in France. The Court cannot uphold Commerce's determination when the basis for the decision is entirely unclear.[3] The Court, therefore, remands this matter to Commerce to reconsider the treatment of depreciation expenses incurred in France in calculating CEP for SNR.

## CONCLUSION

The Court remands this case to Commerce to: (1) reconsider its decision to calculate SKF's home market credit expense based upon price and then apply that rate to cost; (2) exclude any transactions that were not supported by consideration from SKF's United States sales database and to adjust the dumping margins accordingly; (3) first attempt to match SKF's United States sales to similar home market sales before resorting to CV; (4) assign the correct LOT code

---

[3] Indeed, the Supreme Court has opined:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'We must know what a decision means before the duty becomes ours to say whether it is right or wrong.'

*SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) (quoting *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511 (1935)).

for SKF's EP sales in the margin calculation program; (5) determine whether SKF-France's billing adjustment two is insignificant within the meaning of 19 U.S.C. § 1677f-1(a); and (6) reconsider the treatment of depreciation expenses incurred in France in calculating CEP for SNR. Commerce is affirmed in all other respects.

---

SKF USA INC., SKF FRANCE S. A. AND SARMA, PLAINTIFFS AND DEFENDANT-INTERVENORS, *v.* UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY AND SNR ROULEMENTS, DEFENDANT-INTERVENORS AND PLAINTIFFS

Consol. Court No.: 97-02-00269-S1

This case having been duly submitted for decision and this Court, after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED that this case is remanded to the United States Department of Commerce, International Trade Administration ("Commerce") to reconsider its decision to calculate SKF USA Inc., SKF France S.A. and Sarma's (collectively "SKF") home market credit expensed based upon price and then apply that rate to cost; and it is further

ORDERED that Commerce is to exclude any transactions that were not supported by consideration from SKF's United States sales database and to adjust the dumping margins accordingly; and it is further

ORDERED that Commerce is to first attempt to match SKF's United States sales to similar home market sales before resorting to constructed value; and it is further

ORDERED that Commerce is to assign the correct level of trade code for SKF's export price sales in the margin calculation program; and it is further

ORDERED that Commerce is to determine whether SKF-France's billing adjustment two is insignificant within the meaning of 19 U.S.C. § 1677F-1 (a) (1994); and it is further

ORDERED that Commerce is to reconsider the treatment of depreciation expenses incurred in France in calculating constructed export price for SNR Roulements; and it is further

ORDERED that the remand are due within ninety (90) days of the date this opinion is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

## NOTICE OF ENTRY AND SERVICE

This is a notice that an order or judgement was entered in the docket of this action, and was served upon the parties ont he date shown below.

Service was made by depositing a copy of this order or judgement, together with any papers required by USCIT Rule 79(c), in a securely closed endorsed penalty cover in a United States mail recaptacle at One Federal Plaza, New York, New York 10007 and addressed to the attorney or record for each party at the address on the official docket in this action, except that service upon the United States was made by personally delivering a copy to the Attorney-In-Charge, International Trade Field Office, Civil Division, United States Department of Justice, 26 Federal Plaza, New York, New York 10278 or to a clercial employee designated, by the Attorney-In-Charge in a writing field with the clerk of the court.

(Slip. Op. 00-129)

DEFENDERS OF WILDLFE, *ET AL.*, PLAINTIFFS, *v.* PENELOPE D. DALTON, *ET AL*, DEFENDANTS

Court No. 00-02-00060

[Plaintiffs' Motion to Complete the Administrative Record granted in part and denied in part.]

(Decided October 23, 2000)

*Defenders of Wildlife (William J. Snape, III)* for Plaintiffs.

*David W. Ogden*, Assistant Attorney General, United States Department of Justice; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division *(Lucius B. Lau)* for Defendants.

MEMORANDUM OPINION AND ORDER

JUDITH M. BARZILAY, *Judge*:

I

INTRODUCTION

Before the court is Plaintiffs' *Motion to Complete the Administrative Record ("Pls.' Mot.").* Defenders of Wildlife, *et al.* ("Defenders" or "Plaintiffs"), ask the court to order Penelope D. Dalton, *et al.*[1] ("Defendants"), to provide as part of the administrative record, three types of documents: (1) a copy of the contested Government of Mexico affirmative finding determination as required by USCIT R. 72(a)(1) ; (2) all documents submitted by the public, interested parties, and governments with regard to the challenged actions in accordance with USCIT R. 72(a)(3); and (3) all documents directly or indirectly considered by the relevant decisionmakers. For the following reasons, the court grants Plaintiffs' motion with regard to the Government of Mexico affirmative finding determination, the depleted finding regarding the Eastern Spinner Dolphin, and certain Inter-American Tropical Tuna Commission ("IATTC") documents. However, the court denies Plaintiffs' motion with respect to the remainder of the documents that Plaintiffs seek to have included in the administrative record, because Plaintiffs have not provided the court with evidence that the relevant decisionmakers either directly or indirectly considered those documents in the determination.

II

BACKGROUND

Plaintiffs in this case challenge the affirmative finding by Defen-

[1] By delegation, the Secretary of Commerce has given Penelope D. Dalton, in her official capacity as the Assistant Administrator for Fisheries for the National Marine Fisheries Service, an organization of the National Oceanic and Atmospheric Administration of the United States Department of Commerce, the authority to render these findings. Throughout the opinion the court refers to Defendants collectively.

dants that Mexico is in compliance with the International Dolphin Conservation Protection Act's ("IDCPA") requirements and therefore, that the embargo against tuna from Mexico's vessels in the Eastern Pacific ocean should be lifted. *See Notice of Affirmative Finding; Removal of Embargo*, 65 Fed. Reg. 26585 (May 8, 2000). Plaintiffs' amended complaint alleges four violations: (1) Commerce's final rule is a violation of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 (1972); (2) Defendants' decision to lift the Eastern Tropical Pacific ("ETP") yellowfin tuna embargo against Mexico violates the plain language of the IDCPA, Pub. L. No. 105-42, 111 Stat. 1122 (1997); (3) Defendants violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 (1970), by issuing a defective environmental assessment; and (4) Defendants violated the NEPA by failing to prepare an environmental impact statement when instituting the new tuna/dolphin program.

Plaintiffs filed a *Motion for a Temporary Restraining Order and / or a Preliminary Injunction ("Pls.' TRO / PI Mot.")*, claiming that the ETP dolphins and Plaintiffs would suffer immediate irreparable harm if Defendants lifted the embargo. On April 12, 2000, the court held an evidentiary hearing upon that motion. On April 14, 2000, the court issued an order denying the motion, and on April 18, 2000, the court issued an opinion explaining its reasons for denying the temporary restraining order and/or preliminary injunction motion. *See Defenders of Wildlife v. Dalton*, 24 CIT ___, 97 F. Supp.2d 1197 (2000). Familiarity with that opinion is presumed.

On April 14, 2000, Defendants filed the first twenty volumes of the administrative record, and on May 3, 2000, Commerce filed the administrative record with respect to its affirmative finding for Mexico. On June 2, 2000, Defendants filed the first supplemental record volume for documents "inadvertently omitted from the original record." *Defs.' Mem. in Opp. To Pls.' Mot. To Complete the Admin. R. ("Defs.' Opp.")* at 5. Several written and oral communications were then exchanged between Plaintiffs and Defendants regarding potential additions to the administrative record. On July 14, 2000, Commerce wrote a letter to Defenders' counsel, emphasizing that Commerce would file a supplemental record "in the near future in response to Defenders' letters of June 14, and June 30, 2000." *Id.* at 5. The second supplemental record was filed on July 24, 2000. On August 8, 2000, Plaintiffs filed the motion currently before the court.

## III

### Standard of Review

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(i) (1994). The parties do not dispute that in a §1581(i) case, this court reviews the matter as provided in section 706 of Title 5. *See* 28 U.S.C. §2640(e)(1994). The relevant portion of 5 U.S.C. § 706 (1994) provides: "[i]n making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party. . . ." The

scope of review is therefore limited to the administrative record. *See* 28 U.S.C. § 2640(e); 5 U.S.C. § 706; USCIT R. 56.1.

In order to determine whether the administrative record is complete, the parameters of the record must be defined. The United States Supreme Court has determined that the phrase "whole record" within 5 U.S.C. § 706, means "the full administrative record that was before the Secretary at the time he made his decision." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The applicable rule in this case, USCIT R. 72(a), requires that in all actions where judicial review is upon the basis of the record made before an agency, the agency shall file the following documents:

> (1) A copy of the contested determination and the findings or report upon which such determination was based.
> (2) A copy of any reported hearings or conferences conducted by the agency.
> (3) Any documents, comments, or other papers filed by the public, interested parties, or governments with respect to the agency's action. The agency shall identify and file under seal any document, comment, or other information obtained on a confidential basis, including a non-confidential description of the nature of such confidential document, comment or information.
> (4) a certified list of all items specified in paragraphs (1), (2) and (3) of this subdivision (a).

While USCIT R. 72(a) does provide a list of documents to be filed, it does not conclusively define the contents of the administrative record. *See Ammex, Inc. v. United States*, 23 CIT ___, ___, 62 F. Supp. 2d 1148, 1153 (1999). "Although [the rule defines] those documents which, in the normal course, will constitute the administrative record for a particular determination, nothing in USCIT R. 72(a) indicates that this Rule is meant to strictly delineate, or in any way limit, the materials that the Court should examine in reviewing agency action." *Id.*, 23 CIT at ___, 62 F. Supp. 2d at 1154. Yet, "the 'whole' administrative record has come to be seen as 'all documents and materials directly or indirectly considered by agency decisionmakers and includes evidence contrary to the agency's position.'" *Id.*, 23 CIT at ___, 62 F. Supp. 2d at 1156 (quoting *Thompson v. United States Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)(citations omitted)). While true that if the relevant agency decisionmakers considered directly or indirectly any "internal guidelines, memoranda, manuals or other materials in reaching its decision," that material should be included within the record, "[i]n compiling an administrative record, relevant materials that were neither directly nor indirectly considered by agency decisionmakers should not be included." *Id.*(citations omitted).

Where an agency presents a certified copy of the complete administrative record, as was done in this case, "[t]he court assumes the agency properly designated the Administrative Record absent clear

evidence to the contrary." *Id.*, 23 CIT at ___, 62 F. Supp. 2d at 1156 (quoting *Bar MK Ranches v. Yuetter*, 994 F. 2d. 735, 740 (10th Cir. 1993)). In a motion to complete the administrative record, "a party must do more than simply allege that the record is incomplete. Rather, a party must provide the Court with reasonable, non-speculative grounds to believe that materials considered in the decision-making process are not included in the record." *Id.*, 23 CIT at ___, 62 F. Supp.2d at 1156-57 (citations omitted). The burden therefore rests on Plaintiffs to provide evidence that the appropriate decisionmakers either directly or indirectly considered the missing documents while making their decision.

## III

## Discussion

A. *Defendants must complete the administrative record by including a copy of the contested determination on the Mexican Affirmative Finding.*

Plaintiffs assert that Defendants must file the final *Federal Register* notice for the affirmative finding for the Government of Mexico as part of the administrative record. *See Mem. in Supp. of Pls.' Mot. to Complete the Admin. R. ("Pls.' Mem.")* at 7-8. As mentioned above, USCIT R. 72(a)(1) requires that a "copy of the contested determination and the findings or report upon which such determination is based" must be filed as part of the administrative record. Defendant argues that it "did not include the *Federal Register* notice in the administrative record because of the Government's desire to file that record in an expeditious manner." *Defs.' Opp.* at 14. USCIT R. 72(a) does not provide a timing exception to the requirement of filing a copy of the contested determination as part of the administrative record. As Plaintiffs do contest that determination, Commerce will be directed to file the final *Federal Register* notice as part of the administrative record.

B. *Plaintiffs have not provided clear evidence that all documents submitted by the public, interested parties, and governments with respect to the actions challenged by Plaintiffs must be included within the administrative record.*

Plaintiffs seek to have included in the administrative record "comments that were submitted in a timely manner by the public, interested parties, and governments yet not completely reproduced in the record," including: (A) comments by Earth Island Institute, a plaintiff in this case, submitted to defendants regarding the contents of this litigation; (B) comments by Defenders relating to several *Federal Register* notices regarding tuna/dolphin issues; and (C) comments relating to the impending lifting of the embargo. *Pls.' Mem.* at 8. The court will address each of these groups of documents in turn.

(1) *There has been no showing that the Earth Island Institute comments were considered by the relevant decisionmakers.*

Plaintiffs note that the letters from Earth Island Institute submitted to Defendants, as well as an index to the attachments for the comments, are included in the record. Plaintiffs request that the court direct Defendants to provide the attachments themselves. Other than listing the attachments missing from the record, Defenders do nothing to indicate that these attachments are required to be included in the record. Defendants first respond that the attachments to the March 26th letter need not be included in the record because they do not pertain to any of the determinations challenged by Defenders. *See Defs.' Opp.* at 16. As for Earth Island Institute's July 7 letter to Plaintiffs, Defendants note that the letter references only two attachments, both of which were included as part of the record filed with the court, and that no other attachments to that letter exist. *Id.* at 19.

The court need not delve into whether other attachments do exist, or whether the attachments to the March 26th letter are in fact relevant to this litigation. Plaintiffs have not provided any evidence at all, much less any clear evidence, that the missing attachments, either to the March 26th letter or to the July 7th letter, were considered by the relevant decisionmaker at the time she made her determination. Relevant or not, without clear evidence that these attachments were considered, the request for their inclusion must be denied.

(2) *Plaintiffs have not provided clear evidence that the comments submitted by Defenders of Wildlife relating to the December 14, 1999 and December 29, 1999 Federal Register notices should be included in the administrative record.*

Plaintiffs seek to have included in the record comments that they submitted on January 5, 2000, relating to two *Federal Register* notices "regarding potential yellowfin tuna over-fishing in the ETP and other tuna/dolphin issues." *Pls.' Mem.* at 10. In support of their request, Plaintiffs state, "[t]hese public comments, and the issues they raise, directly relate to Plaintiffs' challenge of lifting the Mexican yellowfin tuna embargo because they address whether 'such nation is meeting the obligations of the International Dolphin Conservation Program and the obligations of membership in the Inter-American Tropical Tuna Commission.'" *Id.* (quoting 16 U.S.C. § 1371(a)(2)(B)(1972)). Plaintiffs have again failed to indicate how the comments they seek to have included were considered either directly or indirectly by the relevant decisionmakers. That the comments might be relevant to the tuna embargo does not dictate that they must be included in the administrative record. Therefore, the court cannot require Defendants to include the comments within the record.

(3) *Plaintiffs have not shown the court that comments relating to the lifting of the Mexican embargo on April 12, 2000 must be included within the Administrative Record.*

Plaintiffs state that they are aware of three comment letters filed after publication of the interim final rule on December 21, 1999, but before the decision to lift the Mexican embargo: (1) a letter from the United States Customs Service dated April 10, 2000; (2) a letter from Defenders dated April 3, 2000, with attachments; and (3) a letter from Earth Island Institute, with attachments. *See Pls.' Mem.* at 11. Plaintiffs claim that these and any other documents "filed pursuant to the interim final rule and directed towards the lifting of the Mexican embargo" should be included as part of the administrative record. *Id.* Defendants counter that Plaintiffs' argument for inclusion of their comments within the record fails because the determination challenged in this litigation is the interim final rule, not any subsequently-made modifications, and Defenders' comments concern subsequent *Federal Register* notices.

The court agrees with Defendants that the comments referenced by Plaintiffs need not be included within the record. In this litigation, Defenders contest the interim final rule, and according to USCIT R.72 (a)(2) may seek to have included within the record only "[a] copy of the contested determination *and the findings or report upon which such determination was based.*" (emphasis added). All materials must have been considered by the decisionmaker "at the time he made his decision." *Overton Park*, 401 U.S. at 420. Here, Defenders seek to have included within the record materials considered following publication of the contested determination, rather than materials upon which the determination was based. Moreover, as the letters referenced by Defenders were submitted in April 2000, while the interim final rule was issued on December 21, 1999, the letters could not have been considered by the decisionmaker at the time of the decisionmaking. Hence, Plaintiffs' request to have the comments related to the lifting of the Mexican embargo on April 12, 2000 included in the administrative record is denied.

C. *Plaintiffs have not provided the court with clear evidence that the relevant decisionmakers directly or indirectly considered memoranda, manuals, guidelines and other materials allegedly before the decisionmakers at the time the challenged determination was made, with the exceptions of the depleted finding for the Eastern Spinner Dolphin, and the mentioned group of IATTC documents.*

(1) Defenders' claim that Defendants must submit a "complete version" of all documents in the administrative record fails; the court will not require Defendants to include such materials in the administrative record.

Defenders first provide the court with a list of documents that Plaintiffs believe "are tacitly acknowledged . . . to have been considered by agency decisionmakers since they were included in some form in the original administrative record." *Pls.' Mem.* at 12. These documents

are: (1) a 1950 proclamation by President Truman and an exchange of letters between the United States and Costa Rica on IATTC funding allocations; (2) questions from Senator Barbara Boxer and responses from Assistant Secretary of State David Sandalow regarding IATTC policy, funding obligations, and related issues; (3) an email from Judson Feder, NOAA General Counsel, regarding sample language for affirmative findings, and (4) other instances where the certified list of documents is listed incorrectly in the index or does not specify the documents under the particular heading.

The standard for determining whether a document was considered by the relevant decisionmaker is not whether the document was included in some form in the original administrative record. As mentioned, "a party must provide the Court with reasonable, non-speculative grounds to believe that materials considered in the decision-making process are not included in the record." *Ammex*, 23 CIT at ___, 62 F. Supp.2d at 1156-57 (citations omitted). Plaintiffs' claim that Defendants tacitly acknowledge that they considered these documents because they were included in some form in the original record, but "as a result of photocopying problems, malfunctions, or oversight. . . were incomplete in the original administrative record submission," is utterly speculative and therefore not clear evidence that the documents were considered by the relevant decisionmakers. *Pls.' Mem.* at 12. Defenders has done nothing more than list these documents; it has certainly not provided any clear evidence that they were considered by the relevant decisionmaker. Without any clear evidence of consideration, the court must deny Defenders' request that these documents be included in the record.[2]

Second, Plaintiffs contend that certain documents which were not submitted as part of the record, but which were referenced by documents that were filed as part of the administrative record, are required as part of the record in order to understand the filed documents. Plaintiffs argue that an email contained within the record which references monthly conversations had between Commerce Department official Will Martin and the State Department regarding implementation of the IDCPA confirms that Martin wanted monthly "progress reports" and was therefore an active participant in the tuna/dolphin decision. *See Pls.' Mem.* at 13. Plaintiffs assert that because Martin was involved in the tuna/dolphin decision, Defendants are required to complete the record by including the monthly progress reports, "as well as any other correspondence to or from Martin that is relevant to the counts in this case." *Id.* at 14. Defendants respond that because Martin was not the relevant decisionmaker for any of the determinations at issue in this case, and because the fact that the

---

[2] Although unnecessary to its determination not to include these documents in the record, the court agrees with Defendants that "the fact that the Assistant Administrator for Fisheries directly or indirectly considered one document does not logically lead to the conclusion that she directly or indirectly considered another document." *Defs.' Opp.* at 24. The court also notes that Plaintiffs are incorrect that the email from Judson Feder to Irma Lagomarsino is absent from the record; the email is indeed included in the supplemental record filed on July 24, 2000. *See Supplemental Administrative Record* at 23.

monthly reports may be relevant to the determinations is insufficient for inclusion in the administrative record, Plaintiffs' argument must fail. Defendants are correct.

The *Ammex* opinion considers who meets the definition of "relevant decisionmaker" within the determination of what constitutes the whole record, noting that "'the focus of the inquiry into record definition is how the agency actually functions in its decisionmaking. . . .'" 23 CIT ___, 62 F. Supp. 2d at1162 (quoting *Exxon Corp. v. Dep't of Energy*, 91 FRD 26, 37 (N.D. Tex. 1981)). *Ammex* involved a challenge to a United States Customs Service ruling; this court determined that certain officials were not the relevant decisionmakers, because the evidence did not "indicate that the officials involved synthesized the relevant record documents. . ., formulated Customs' institutional position on this issue, drafted any part of this Headquarters Ruling, or otherwise acted as an agency decisionmaker." 23 CIT at ___, 62 F. Supp.2d at 1163.

Plaintiffs have given the court no reason to believe that Martin was a relevant decisionmaker in the promulgation of the interim final rule; they have only indicated that Martin was somehow involved in the tuna/dolphin decision. *See Pls.' Br.* at 13-14. Plaintiffs have provided the court with no evidence indicating that Martin synthesized relevant documents, formulated Customs' position on the determination to lift the Mexican embargo, or in any other way acted as an agency decisionmaker. Moreover, Defendants counter that in his capacity as Deputy Assistant Secretary for International Affairs, Martin did not possess the authority to promulgate the contested determination, and therefore was not the decisionmaker for the challenged determinations. *See Defs.' Br.* at 27. . Therefore, the court will not require Defendants to include the monthly reports received by Martin within the administrative record. The court further notes that again, simply because the purported monthly reports may have been relevant to the contested determination does not warrant their inclusion in the administrative record. Relevance is insufficient; the reports must have been directly or indirectly considered in the decision-making process.

(2) *Plaintiffs have demonstrated by clear evidence that the depleted finding for the Eastern Spinner Dolphin and the IATTC documents were otherwise considered by relevant decisionmakers and should therefore be included in the Administrative Record; Plaintiffs have not shown that other additional documents should be included within the record.*

Defenders contend that there are at least five sets of documents "that Plaintiffs know to have been in possession of Defendants at the time of their decisions, and that either had to be considered by the decision makers as a matter of law to make their final agency actions or were obviously considered given the nature of the present record." *Pls.' Br.* at 14. Plaintiffs correctly note that clear evidence indicating that certain documents not present in the administrative record but

considered by the relevant decisionmakers includes "reasonable, non-speculative grounds" to believe that materials not in the record were still considered by the relevant decisionmaker. *Id.* at 15 (quoting *Ammex*, 23 CIT at ___, 62 F.2d at 1156). Plaintiffs claim that these reasonable and non-speculative grounds are present because Plaintiffs either possess the documents or possess materials indicating the documents' existence, and "[u]nder CIT case law, 'reasonable bases' for adding materials considered by the agency include specifically identifying documents that were left out of the record or demonstrating incompleteness evident from the record itself." *Id.* Plaintiffs identify the documents considered by the relevant decisionmakers but not included within the administrative record as: (1) the depleted finding for the Eastern Spinner Dolphin; (2) Centrally relevant IATTC documents; (3) United States GATT Submissions and Documents on Tuna/Dolphin; (4) United States Dolphin Mortality Limits Procedures and Permits; and (5) Commerce Department Press Release on the Final Rule. *See Pls.' Br.* at 14-25.

First, Defenders assert that the depleted finding for the Eastern Spinner dolphin must be included within the administrative record, because "it is consistent with Defendant's practice to include depleted findings for other cetaceans," and because inclusion of the finding would be consistent with the analysis of this dolphin stock present in the record. *Id.* at 16. Commerce is correct that the administrative record need not consist of those documents merely related to one another; moreover, mere mention of the Eastern Spinner dolphin in the record is not clear evidence that the depleted finding itself was considered. However, Plaintiffs have shown that the depleted finding for the Eastern Spinner dolphin was not merely mentioned in the administrative record, but analyzed in several sections of the record. *See Pls.' Br.* at 16 (citing Administrative Record ("AR") I-7, AR III-44, AR VIII-115, AR VIII-123, AR XIII-399, AR XVI-597, AR X-151). The focus in the record on the Eastern Spinner dolphin is clear evidence that the depleted finding was directly or indirectly considered by the relevant decisionmakers. Therefore, the court will require Defendants to include the finding in the administrative record.

Second, Defenders list several IATTC documents that it contends must be included in the record. Again, Defenders' argument is that it is Defendants' usual practice to include these documents in the record, and that "there are numerous correspondences in the record that explicitly reference IATTC documents." *Id.* at 17. Plaintiffs further explain that these documents should be included in the record because they are very similar to documents in the record, and they address issues that are central to the merits of this action. Plaintiffs have shown sufficient evidence that the specific documents listed were considered in the decisionmaking process: the documents were explicitly referenced in the record, are similar to documents already contained within the record, and are relevant to the issues in this litigation. As such, the court will require inclusion of the documents

within the administrative record.

By contrast, Plaintiffs have not demonstrated that the United States' submissions on the two GATT Arbitral Dispute Panels, documents related to the process for issuing Dolphin Morality Limit permits in the United States under the IDCPA, and the *Commerce News* press release relating to the IDCPA regulations were considered, either directly or indirectly, by the relevant decisionmakers. The court will therefore not demand that these documents be included within the administrative record.

## IV

## CONCLUSION

Upon consideration of Plaintiffs' *Motion to Complete the Administrative Record*, Defendants' response thereto, and all other papers and proceedings therein, it is hereby

ORDERED that Plaintiffs' motion is granted with respect to the contested determination in the Mexico Affirmative Finding, 65 Fed. Reg. 26585 (May 8, 2000), the depleted finding of the Eastern Spinner Dolphin, and the mentioned IATTC documents; and it is further

ORDERED that Plaintiffs' motion is denied in all other respects; and it is further

ORDERED that Defendants are required to add the Mexican Affirmative Finding, the depleted finding of the Eastern Spinner Dolphin, and the IATTC documents to the administrative record within 30 days of the issuance of this Memorandum Opinion and Order.

---

(Slip Op. 00-130)

AMERICAN SILICON TECHNOLOGIES, ELKEM METALS COMPANY, GLOBE METALLURGICAL, INC. AND SKW METALS & ALLOYS, INC., PLAINTIFFS, *v.* 5. UNITED STATES, DEFENDANT, AND ELECTROSILEX BELO HORIZONTE, DEFENDANT-INTERVENOR

Court No. 94-09-00555

[The Court remands the Department of Commerce's determination in *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 59 Fed. Reg. 42,806 (Aug. 19, 1994), as to Companhia Brasileira Carbureto de Calcio and Companhia Ferroligas Minas Gerais-Minasligas and sustains it as to Eletrosilex Belo Horizonte].

(Dated: October 13, 2000)

*Baker & Botts, L.L.P. (William D. Kramer and Martin Schaefermeier)* for plaintiffs American Silicon Technologies, Elkem Metals Company, Globe Metallurgical, Inc. and SKW Metals & Alloys, Inc.

*David W. Ogden*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Reginald T. Blades, Jr.*), and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*John F. Koeppen*), of counsel, for defendant.

*Verner, Liipfert, Bernhard, McPherson & Hand* (*Wayne S. Bishop*) for defendant-intervenor Eletrosilex Belo Horizonte.

Before: MUSGRAVE, *Judge*

OPINION

In this action, plaintiffs American Silicon Technologies, Elkem Metals Company, Globe Metallurgical, Inc. and SKW Metals & Alloys, Inc. (collectively "American Silicon"), domestic producers of silicon metal, contest several aspects of the final results of the first administrative review of the antidumping duty order on silicon metal from Brazil, *Silicon Metal from Brazil; Final Results of Antidumping Duty Administrative Review*, 59 Fed. Reg. 42,806 (Aug. 19, 1994)[1] ("*Final Results*"), issued by the International Trade Administration of the United States Department of Commerce ("Commerce" or "the agency"). This Court has jurisdiction pursuant to 19 U.S.C. § 1516a(a) and 28 U.S.C. § 1581(c).

American Silicon previously moved for judgment upon the agency record pursuant to CIT Rule 56.2 requesting remand to Commerce for correction of eleven alleged errors. As Commerce consented to remand on eight of the issues, the Court remanded those issues and stayed the remaining three. *See American Silicon Technologies v. United States*, 21 CIT 501 (1997). After the initial remand results were issued, the Court, on motion of Commerce, ordered a second remand of one issue. *See American Silicon Technologies v. United States*, 22 CIT __, Slip Op. 98-22 (Mar. 5, 1998). After the second remand results were issued, the Court sustained the remand determinations on all eight issues and lifted the stay on the remaining three. *See American Silicon Technologies v. United States*, 23 CIT __, Slip Op. 99-94 (Sept. 9, 1999).

The issues now before the Court are: (1) whether Commerce erred in calculating financial expenses for Companhia Brasileira Carbureto de Calcio ("CBCC"), a Brazilian producer of silicon metal, by using as best information available ("BIA")[2] a net financial expense figure which

---

[1] The amendments made by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994), do not apply in this action because this administrative review was commenced before January 1, 1995. *See AK Steel Corp. v. United States*, 21 CIT 1204, 1205 n.1 (1997) (citing *Torrington Co. v. United States*, 68 F.3d 1347, 1352 (Fed Cir. 1995)).

[2] Title 19, section 1677e(c) of the United States Code (1988) provides:

> In making their determinations under this subtitle, the administering authority and the Commission shall, whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

had been offset by both long-term and short-term interest income, rather than only short-term interest income; (2) whether Commerce erred by excluding from the calculation of constructed value the *imposto sobre a circulacao de mercadorias e servicos* ("ICMS") and *imposto sobre produtos industrialzados* ("IPI") Brazilian value-added taxes paid by CBCC and Companhia Ferroligas Minas Gerais-Minasligas ("Minasligas"), another Brazilian producer of silicon metal, on materials used to produce silicon metal; and (3) whether Commerce erred in calculating a dumping margin for Eletrosilex Belo Horizonte ("Eletrosilex"), also a Brazilian producer of silicon metal, based on sales of silicon metal during the period of review when Eletrosilex made no entries of silicon metal into U.S. customs territory during the period of review. For the reasons which follow, the Court remands the first and second issues to Commerce and sustains Commerce's determination on the third issue.

## STANDARD OF REVIEW

The Court shall uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938), and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)).

## DISCUSSION

The Court first addresses the issue of whether Commerce erred by calculating CBCC's financial expenses using a net financial expense figure. In the *Final Results*, Commerce determined that it was appropriate and consistent with its "normal practice" to calculate CBCC's interest expenses on a consolidated basis with its parent company, Solvay do Brasil ("Solvay") because Solvay owned 99.8 percent of CBCC and facts indicated that "the degree of relationship influenced the structure of debt for the entire company." *Final Results*, 59 Fed. Reg. at 42,807. During verification Commerce requested source documents for Solvay's income and expenses, but CBCC did not provide this information. American Silicon alleges that this information would have enabled Commerce to "calculate any offset to total financial expenses for interest income derived from short-term investments of working capital, in accordance with established Department practice." Plaintiffs' Supplemental Brief at 10.

Due to CBCC's failure to provide the requested information, Commerce used BIA to determine CBCC's financial expenses. As BIA, Commerce derived a percentage from Solvay's financial statements and "applied [this percentage] to each month's [cost of manufacture] to ensure that CBCC's [cost of production] data fully reflected interest expenses." *Final Results*, 59 Fed. Reg. at 42,807. American Sili-

con alleges that in calculating this percentage, Commerce

> erroneously used a *net* financial expense figure that had been reduced by *all* interest income, including long-term and short-term interest income. In doing so, the Department violated its established practice . . . which is to offset financial expenses only with *short-term* interest income. Moreover, . . . the Department calculated financial expenses more favorable to CBCC than it would have calculated had CBCC been forthcoming and provided the information requested by the Department.

Plaintiffs' Supplemental Brief at 10-11 (emphasis in original).

First, the Court considers whether Commerce improperly deviated from its established practice. Commerce agrees that its "practice is to reduce financial expenses by only short-term interest income when [it] has adequate information to apply that method properly." Defendant's Supplemental Brief in Reply to Plaintiff's Supplemental Brief ("Defendant's Supplemental Brief") at 5. This Court has previously recognized that "an administrative agency has the authority to change or revoke its policies and practices, if a reasonable explanation is provided for such a change." *Sanyo Elec. Co., Ltd. v. United States*, 23 CIT __, __, 86 F. Supp. 2d 1232, 1241 (1999) (citing *Rust v. Sullivan*, 500 U.S. 173, 186-87 (1991)); *accord Queen's Flowers de Columbia v. United States*, 21 CIT 968, 976, 981 F. Supp. 617, 625 (1997); *Citrosuco Paulista, S.A. v. United States*, 12 CIT 1196, 1209, 704 F. Supp. 1075, 1088 (1988). The Court's "review of an agency's change of position or practice will center on whether the action was arbitrary and capricious", and the Court will find the change arbitrary unless it is supported by substantial evidence. *Sanyo Elec. Co.*, 86 F. Supp. 2d at 1241 (citation omitted). In the instant case, Commerce explains that "the information chosen . . . as BIA did not allow separation of long-term from short-term interest income, [therefore] Commerce had the choice of reducing financial expenses by the interest income as reported upon the financial statements (which it chose) or not reducing financial expenses at all (which it did not choose)." Defendant's Supplemental Brief at 5. In the absence of evidence to the contrary, the Court finds that this explanation adequately justifies Commerce's departure from its established practice.

Next, the Court considers whether Commerce's decision to offset financial expenses by all reported interest income is otherwise in accordance with law. It is well established that Commerce has discretion in choosing and applying BIA. *See Allied Signal Aerospace Co. v. United States*, 996 F.2d 1185, 1191 (Fed. Cir. 1993) ("[B]ecause Congress has 'explicitly left a gap for the agency to fill' in determining what constitutes the best information available, the ITA's construction of the statute must be accorded considerable deference."). Nevertheless, "[t]he purpose behind permitting Commerce to resort to BIA is to induce respondents to provide Commerce with requested

information in a timely, complete, and accurate manner". *National Steel Corp. v. United States*, 18 CIT 1126, 1129, 870 F. Supp. 1130, 1134 (1994) (citations omitted). Accordingly, the Court has recognized that "[a]lthough the ultimate purpose of BIA is not to punish, BIA is intended to be adverse". *National Steel Corp.*, 18 CIT at 1132, 870 F. Supp. at 1136 (citing *Pulton Chain Co. v. United States*, 17 CIT 1336, 1339 (1993)).[3]

In the instant case, Commerce resorted to BIA after CBCC failed to provide source documents which allegedly would have enabled Commerce to determine the amount of Solvay's short-term interest income. Plaintiffs' Supplemental Brief at 10. Nothing on the record indicates that Commerce's application of BIA was adverse to CBCC in spite of the fact that the interest deduction was larger than it would have been under normal circumstances. Based on the facts presented, and in the absence of evidence to the contrary, the Court concludes that CBCC benefitted from the use of Solvay's net financial expense figure as BIA. Therefore, Commerce's decision to use Solvay's net financial expense figure is not in accordance with law. The Court remands this issue to the agency, which shall either (1) demonstrate that CBCC does not benefit from Commerce's use of Solvay's net financial expense figure, or (2) recalculate the percentage used to determine CBCC's cost of production using either Solvay's gross financial expense figure or other appropriate information as BIA.

The Court next considers the issue of whether Commerce erred by excluding from the calculation of constructed value the ICMS and IPI taxes paid by CBCC and Minasligas on materials used to produce silicon metal. Recently in *Camargo Correa Metais, S.A. v. United States*, 200 F.3d 771 (Fed. Cir. 1999), the Federal Circuit held that "unless ICMS are remitted or refunded 'upon exportation', they are properly included in the constructed value of the exported merchandise." *Id.* at 774. In light of this decision, Commerce states that it now agrees "that 'the ICMS and IPI taxes paid by CBCC and Minasligas . . . must be included in [constructed value].'" Defendant's Supplemental Brief at 3 (quoting Plaintiff's Supplemental Brief at 6). Accordingly, the Court remands this issue to Commerce and instructs the agency to recalculate constructed value for CBCC and Minasligas. In the recalculation, Commerce shall include ICMS and IPI taxes in conformity with the Federal Circuit's holding in *Camargo*.

Finally, the Court addresses the issue of whether Commerce erred in calculating a dumping margin for Eletrosilex even though Eletrosilex made no entries of silicon metal into U.S. customs territory during the period of review. Presently before the Court is a motion by American Silicon for severance and dismissal of Count II of the Complaint, which pertains to this issue. As this motion is unop-

---

[3] Although *National Steel* involved the use of "total BIA" and the instant case involves the use of only "partial BIA," the principle that BIA should be adverse applies in both instances. *See Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 18 CIT 906, 915 n.22, 865 F. Supp. 857, 865 n.22 (1994) ("In a 'partial BIA' situation the only instance in which BIA is not adverse is when there is an inadvertent gap in the record . . . or when the missing data is beyond the control of the respondent.").

posed, it is hereby granted, and Count II of the Complaint is dismissed. Furthermore, as all issues in this action concerning Eletrosilex have now been resolved, the Court sustains Commerce's dumping margin determination for Eletrosilex.

CONCLUSION

For the foregoing reasons the *Final Results* are sustained as to Eletrosilex and remanded as to CBCC and Minasligas for further proceedings consistent with this Opinion. Commerce shall submit its remand determination within 90 days of the date of this Opinion. The parties shall then have 30 days to submit comments on the remand determination. Any rebuttal comments shall be submitted within 15 days thereafter.

---

(Slip Op. 00-131)

SNR ROULEMENTS; SKF USA INC., SKF FRANCE S.A. AND SARMA, PLAINTIFFS, *v.* 5. UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR

Consol. Court No. 97-10-01825

Plaintiffs SNR Roulements ("SNR"), SKF USA Inc., SKF France S.A. and SARMA (collectively "SKF") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews ("Final Results"), 62 Fed. Reg. 54,043 (Oct. 17, 1997), as amended, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore[,] Sweden and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews*, 62 Fed. Reg. 61,963 (Nov. 20, 1997). Defendant-intervenor, The Torrington Company ("Torrington"), filed a response to SNR and SKF's USCIT R. 56.2 motions for judgment upon the agency record challenging certain determinations of Commerce's *Final Results*.

Specifically, SNR and SKF contend that Commerce unlawfully: (1) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the subject reviews of the applicable antidumping duty orders covering antifriction bearings from France; (2) determined that it applied a reasonable duty absorption methodology and that duty absorption had in fact occurred; and (3) excluded below-cost sales from the profit calculation for constructed value under 19 U.S.C. § 1677b(e)(2) (1994).

SNR further contends that Commerce unlawfully: (1) excluded amounts for imputed credit and inventory carrying expenses in its calculation of total expenses for the constructed export price ("CEP") profit ratio; and (2) denied a partial, price-based level of trade adjustment to normal value for CEP sales.

Held: SKF's USCIT R. 56.2 motion is denied in part and granted in part. SNR's USCIT R. 56.2 motion is denied in part and granted in part. Torrington's USCIT R. 56.2 motion is denied in part and granted in part. This case is remanded to Commerce to (1) annul all findings and conclusions made pursuant to the duty absorption inquiry conducted for this review; and (2) include all expenses included in "total United States expenses" in the calculation of "total expenses."

[SKF's, SNR's and Torrington's USCIT R. 56.2 motions are denied in part and granted in part. Case remanded.]

(Dated: October 13, 2000)

*Grunfeld, Desiderio, Lebowitz & Silverman LLP* (*Bruce M. Mitchell* and *Mark E. Pardo*) for SNR.

*Steptoe & Johnson LLP* (*Herbert C. Shelley* and *Alice A. Kipel*) for SKF.

*David W. Ogden*, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrencis*, Assistant Director); of counsel: *Mark A. Barnett*, *Patrick V. Gallagher*, *Myles S. Getlan* and *David R. Mason*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

*Stewart and Stewart* (*Terence P. Stewart*, *Wesley K. Caine*, *Geert De Prest* and *Lane S. Hurewitz*) for defendant-intervenor.

## OPINION

TSOUCALAS, *Senior Judge*: Plaintiffs SNR Roulements ("SNR"), SKF USA Inc., SKF France S.A. and SARMA (collectively "SKF") move pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews* ("*Final Results*"), 62 Fed. Reg. 54,043 (Oct. 17, 1997), as amended, *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore[,] Sweden and the United Kingdom; Amended Final Results of Antidumping Duty Administrative Reviews* ("*Amended Final Results*"), 62 Fed. Reg. 61,963 (Nov. 20, 1997). Defendant-intervenor, The Torrington Company ("Torrington"), filed a response to SNR and SKF's USCIT R. 56.2 motions for judgment upon the agency record challenging certain determinations of Commerce's *Final Results*.

Specifically, SNR and SKF contend that Commerce unlawfully: (1) conducted a duty absorption inquiry under 19 U.S.C. § 1675(a)(4) (1994) for the subject reviews of the applicable antidumping duty orders covering antifriction bearings from France; (2) determined that it applied a reasonable duty absorption methodology and that duty absorption had in fact occurred; and (3) excluded below-cost sales from the profit calculation for constructed value ("CV") under 19 U.S.C. § 1677b(e)(2) (1994).

SNR further contends that Commerce unlawfully: (1) excluded amounts for imputed credit and inventory carrying expenses in its calculation of total expenses for the constructed export price ("CEP") profit ratio; and (2) denied a partial, price-based level of trade ("LOT") adjustment to normal value ("NV") for CEP sales.

## BACKGROUND

On May 15, 1989, Commerce published antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof ("AFBs") imported from several countries, including France. *See Antidumping Duty Orders: Ball Bearings, Cylindrical Roller Bearings, and Spherical Plain Bearings, and Parts Thereof From Japan*, 54 Fed. Reg. 20,904. This case concerns the seventh administrative review of the antidumping duty order on AFBs from France for the period of review ("POR") covering May 1, 1995 through April 30, 1996.[1] On June 10, 1997, Commerce published the preliminary results of the seventh review. *See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Romania, Singapore, Sweden and the United Kingdom; Preliminary Results of Antidumping Duty Administrative Reviews and Partial Termination of Administrative Reviews* ("*Preliminary Results*"), 62 Fed. Reg. 31,566. Commerce published the *Final Results* on October 17, 1997, *see* 62 Fed. Reg. at 54,043, and the *Amended Final Results* on November 20, 1997, *see* 62 Fed. Reg. at 61,963.

## JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

## STANDARD OF REVIEW

In reviewing a challenge to Commerce's final determination in an antidumping administrative review, the Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); *see NTN Bearing Corp. of America v. United States*, 24 CIT ___, ___, 104 F. Supp. 2d 110, 115-16 (2000) (detailing Court's standard of review for antidumping proceedings).

## DISCUSSION

### I. *Duty Absorption Inquiry*

### A. *Background*

Title 19, United States Code, § 1675(a)(4) provides that during an administrative review initiated two or four years after the "publica-

[1] Since the administrative review at issue was initiated after December 31, 1994, the applicable law in this case is the antidumping statute as amended by the Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994) (effective Jan. 1, 1995).

tion" of an antidumping duty order, Commerce, if requested by a domestic interested party, "shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter." Section 1675(a)(4) further provides that Commerce shall notify the International Trade Commission ("ITC") of its findings regarding such duty absorption for the ITC to consider in conducting a five-year ("sunset") review under 19 U.S.C. § 1675(c) (1994), and the ITC will take such findings into account in determining whether material injury is likely to continue or recur if an order were revoked under § 1675(c). *See* 19 U.S.C. § 1675a(a)(1)(D) (1994).

On May 31, 1996 and July 9, 1996, Torrington requested that Commerce conduct a duty absorption inquiry pursuant to § 1675(a)(4) with respect to various respondents, including SNR and SKF, to ascertain whether antidumping duties had been absorbed during the seventh POR. *See Final Results*, 62 Fed. Reg. at 54,075.

In the *Final Results*, Commerce found that duty absorption had occurred for the POR. *See id.* at 54,044. In asserting authority to conduct a duty absorption inquiry under § 1675(a)(4), Commerce first explained that for "transition orders," as defined in 19 U.S.C. § 1675(c)(6)(C) (that is, antidumping duty orders, *inter alia*, deemed issued on January 1, 1995), regulation 19 C.F.R. § 351.213(j) provides that Commerce "will make a duty-absorption determination, if requested, for any administrative review initiated in 1996 or 1998." *Id.* at 54,074. Commerce concluded that (1) because the antidumping duty order on the AFBs in this case has been in effect since 1989, the order is a transition order pursuant to § 1675(c)(6)(C), and (2) since this review was initiated in 1996 and a request was made, Commerce had the authority to make a duty absorption inquiry for the seventh POR. *See id.* at 54,075.

B. *Contentions of the Parties*

SNR and SKF contend that Commerce lacked authority under § 1675(a)(4) to conduct a duty absorption inquiry for the seventh POR of the outstanding 1989 antidumping duty orders. *See* SNR's Br. Supp. Mot. J. Agency R. ("SNR's Br.") at 16-19; SKF's Br. Supp. Mot. J. Agency R. ("SKF's Br.") at 9-16. In the alternative, SNR and SKF assert that even if Commerce possessed the authority to conduct such an inquiry, Commerce's methodology for determining duty absorption was contrary to law and, accordingly, the case should be remanded to Commerce to reconsider its methodology. *See* SNR's Br. at 19-22; SKF's Br. at 16-36.

Commerce argues that it: (1) properly construed subsections (a)(4) and (c) of § 1675 as authorizing it to make a duty absorption inquiry for antidumping duty orders that were issued and published prior to January 1, 1995; and (2) devised and applied a reasonable methodology for determining duty absorption. *See* Def.'s Mem. Opp'n Pls.'

Mot. J. Agency R. ("Def.'s Mem.") at 22-38. Torrington generally agrees with Commerce's contentions. *See* Torrington's Resp. Pls.' Mot. J. Agency R. ("Torrington's Resp.") at 6-12.

C. *Analysis*

In *SKF USA Inc. v. United States*, 24 CIT ___, 94 F. Supp. 2d 1351 (2000), this Court determined that Commerce lacked statutory authority under § 1675(a)(4) to conduct a duty absorption inquiry for antidumping duty orders issued prior to the January 1, 1995 effective date of the URAA. *See id.* at ___, 94 F. Supp. 2d at 1357-59. The Court noted that Congress expressly prescribed in the URAA that § 1675(a)(4) "must be applied prospectively on or after January 1, 1995 for 19 U.S.C. § 1675 reviews." *Id.* at ___, 94 F. Supp. 2d at 1359 (citing § 291 of the URAA).

Because Commerce's duty absorption inquiry, its methodology and the parties' arguments at issue in this case are practically identical to those presented in *SKF USA*, the Court adheres to its reasoning in *SKF USA*. The statutory scheme clearly provides that the inquiry must occur in the second or fourth administrative review after the publication of the antidumping duty order, not in any other review, and upon the request of a domestic interested party. Accordingly, the Court finds that Commerce did not have statutory authority to undertake a duty absorption investigation for the outstanding 1989 antidumping duty orders in dispute here.

II. *Profit Calculation for CV*

A. *Background*

For this POR, Commerce used CV as the basis for NV "when there were no usable sales of the foreign like product in the comparison market." *Preliminary Results*, 62 Fed. Reg. at 31,571. Commerce calculated the profit component of CV using the statutorily preferred methodology of 19 U.S.C. § 1677b(e)(2)(A) (1994). *See Final Results*, 62 Fed. Reg. at 54,062. Specifically, in calculating CV, the statutorily preferred method is to calculate an amount for profit based on "the actual amounts incurred and realized by the specific exporter or producer being examined in the investigation or review . . . in connection with the production and sale of a foreign like product [made] in the ordinary course of trade, for consumption in the foreign country." 19 U.S.C. § 1677b(e)(2)(A).

In applying the "preferred" method for calculating CV profit under § 1677b(e)(2)(A), Commerce determined that "the use of aggregate data that encompasses all foreign like products under consideration for NV results in a practical measure of profit that we can apply consistently in each case." *Final Results*, 62 Fed. Reg. at 54,062. Also, in calculating CV profit under § 1677b(e)(2)(A), Commerce excluded below-cost sales from the calculation which it disregarded in the determination of NV pursuant to 19 U.S.C. § 1677b(b)(1). *See id.* at 54,063.

B. *Contentions of the Parties*

SNR and SKF contend that Commerce's use of aggregate data encompassing all foreign like products under consideration for NV in calculating CV profit is contrary to § 1677b(e)(2)(A). *See* SNR's Br. at 5-10; SKF's Br. at 37-40. Instead, SNR and SKF claim that Commerce should have relied on the alternative methodology of § 1677b(e)(2)(B)(i), which provides a CV profit calculation that is similar to the one Commerce used, but does not limit the calculation to sales made in the ordinary course of trade, that is, below-cost sales are not excluded from the calculation. *See* SNR's Br. at 10-11; SKF's Br. at 40-52. SKF also asserts that if Commerce's exclusion of below-cost sales from the numerator of the CV profit calculation is lawful, Commerce should nonetheless include such sales in the denominator of the calculation to temper bias which is inherent in Commerce's dumping margin calculations. *See* SKF's Br. at 53-55.

Commerce responds that it properly calculated CV profit pursuant to § 1677b(e)(2)(A) based on aggregate profit data of all foreign like products under consideration for NV. *See* Def.'s Mem. at 7-22. Consequently, Commerce maintains that since it properly calculated CV profit under subparagraph (A) rather than (B) of § 1677b(e)(2), it correctly excluded below-cost sales from the CV profit calculation. *See id.* at 10-11. Torrington agrees with Commerce's methodology for calculating CV profit. *See* Torrington's Resp. at 13-15.

C. *Analysis*

In *RHP Bearings Ltd. v. United States*, 23 CIT ___, 83 F. Supp. 2d 1322 (1999), this Court upheld Commerce's CV profit methodology of using aggregate data of all foreign like products under consideration for NV as being consistent with the antidumping statute. *See id.* at ___, 83 F. Supp. 2d at 1336. Since Commerce's CV profit methodology and SKF's arguments at issue in this case are practically identical to those presented in *RHP Bearings*, the Court adheres to its reasoning in *RHP Bearings*. The Court, therefore, finds that Commerce's CV profit methodology is in accordance with law.

Moreover, since (1) § 1677b(e)(2)(A) requires Commerce to use the actual amount for profit in connection with the production and sale of a foreign like product in the ordinary course of trade, and (2) 19 U.S.C. § 1677(15) (1994) provides that below-cost sales disregarded under § 1677b(b)(1) are considered to be outside the ordinary course of trade, the Court finds that Commerce properly excluded below-cost sales from the CV profit calculation.

III. *Commerce's Treatment of SNR's Imputed Credit and Inventory Carrying Costs in the Calculation of CEP Profit*

A. *Background*

In calculating CEP, Commerce must reduce the starting price used to establish CEP by "the profit allocated to the expenses described in

paragraphs (1) and (2)" of § 1677a(d) (1994). 19 U.S.C. § 1677a(d)(3). Under 19 U.S.C. § 1677a(f), the "profit" that will be deducted from this starting price will be "determined by multiplying the total actual profit by [a] percentage" calculated "by dividing the total United States expenses by the total expenses." *Id.* § 1677a(f)(1), (2)(A). Section 1677a(f)(2)(B) defines "total United States expenses" as the total expenses deducted under § 1677a(d)(1) and (2), that is, commissions, direct and indirect selling expenses, assumptions, and the cost of any further manufacture or assembly in the United States.

Section 1677a(f)(2)(C) establishes a tripartite hierarchy of methods for calculating "total expenses." First, "total expenses" will be "[t]he expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country" if Commerce requested such expenses for the purpose of determining NV and CEP. *Id.* § 1677a(f)(2)(C)(i). If category (i) does not apply, then "total expenses" will be "[t]he expenses incurred with respect to the narrowest category of merchandise sold in the United States and the exporting country which includes the subject merchandise." *Id.* § 1677a(f)(2)(C)(ii). If neither category (i) or (ii) applies, then "total expenses" will be "[t]he expenses incurred with respect to the narrowest category of merchandise sold in all countries which includes the subject merchandise." *Id.* § 1677a(f)(2)(C)(iii). "Total actual profit" is based on whichever category of merchandise is used to calculate "total expenses" under § 1677a(f)(2)(C). *See id.* § 1677a(f)(2)(D).

SNR reported United States sales that Commerce treated as CEP sales pursuant to 19 U.S.C. § 1677a(b), and Commerce deducted an amount for profit allocated to the expenses enumerated by 19 U.S.C. § 1677a(d)(1) and (2). *See* 19 U.S.C. § 1677a(d)(3). In the profit calculation, Commerce excluded imputed expenses and carrying costs from the "total actual profit" calculation, defined in § 1677a(f)(2)(D), and from the "total expenses" calculation, defined in § 1677a(f)(2)(C), but included them in the "total United States expenses" calculation, defined in § 1677a(f)(2)(B). SNR objected to the omission of imputed expenses and carrying costs from "total actual profit" and "total expenses," and Commerce responded with the following:

> [S]ections 772(f)(1) and 772(f)(2)(D) of the Tariff Act state that the per-unit profit amount shall be an amount determined by multiplying the total actual profit by the applicable percentage (ratio of total U.S. expenses to total expenses) and that the total actual profit means the total profit earned by the foreign producer, exporter, and affiliated parties. In accordance with the statute, we base the calculation of the total actual profit used in calculating the per-unit profit amount for CEP sales on actual revenues and expenses recognized by the company. In calculating the per-unit cost of the U.S. sales, we have included net interest expense. Therefore, we do not need to include imputed interest expenses

> in the "total actual profit" calculation since we have already accounted for actual interest in computing this amount under section 772(f)(1). When we allocated a portion of the actual profit to each CEP sale, we have included imputed credit and inventory carrying costs as part of the total U.S. expense allocation factor. This methodology is consistent with section 772(f)(1) of the statute, which defines "total United States expense" as the total expenses described under section 772(d)(1) and (2). Such expenses include both imputed credit and inventory carrying costs.

*Final Results*, 62 Fed. Reg. at 54,072.

B. *Contentions of the parties*

SNR complains that in calculating "total United States expenses" pursuant to 19 U.S.C. § 1677a(f)(2)(B), Commerce included amounts for imputed credit and inventory carrying expenses, but failed to include these amounts in its calculation of "total expenses," as defined by 19 U.S.C. § 1677a(f)(2)(C). *See* SNR's Br. at 12. SNR argues that the plain language of the statute demonstrates that "total United States expenses" is a subset of "total expenses" and, therefore, any expense constituting "'total United States expenses' ([that is], expenses incurred in selling the subject merchandise in the United States)" must also be included in "'total expenses' ([that is], all expenses incurred in selling the subject merchandise in the United States and the foreign like product in the home market)." *Id.* at 12-13. SNR argues that Commerce should not be permitted to ignore the plain language of the statute. *See id.*

Commerce maintains that the statute does not address the use of imputed expenses in the calculation of "total expenses" or "total actual profit." *See* Def.'s Mem. at 40. Commerce considers imputed selling expenses, including imputed credit and inventory carrying costs, to be selling expenses encompassed by § 1677a (d)(1) and (2) and, as such, includes them in the calculation of "total United States expenses." *See id.* at 42-43. Commerce, however, did not include the imputed expenses in "total actual profit" because "normal accounting principles permit the deduction of only actual booked expenses not imputed expenses in calculating profit." *Id.* at 43 (citation omitted). Additionally, Commerce did not include imputed expenses in total actual profit because "its calculation of profit already includes net interest expenses, and, as [a] result, there is no need to include imputed interest expenses in determining total profit" and because the statute specifically directs that actual profit be used. *Id.*

Commerce also maintains that it did not include imputed expenses in "total expenses" since Commerce is required to calculate "total actual profit" on the same basis as "total expenses" pursuant to 19 U.S.C. § 1677a(f)(2)(D). *See id.* at 42. Commerce argues that while the statute clearly provides that "total actual profit" is to be based upon the total profit earned "'with respect to the same merchandise

for which total expenses are determined,'" the provision for "total expenses" merely encompasses "'all expenses . . . which are incurred by or on behalf of the foreign producer and foreign exporter . . . with respect to the production and sale of such merchandise.'" Def.'s Mem. at 40 (quoting 19 U.S.C. § 1677a(f)(2)(C) and (D)).

Finally, Commerce contends that if "Congress intended that Commerce utilize the same types of expenses for both 'total United States expenses' and 'total expenses,' it would have made that intent clear," and would not have assigned disparate definitions for each term. *Id.* at 44. Torrington generally agrees with Commerce. *See* Torrington's Br. at 16-17.

C. *Analysis*

To determine whether Commerce's interpretation and application of the antidumping statute is "in accordance with law," the Court must undertake the two-step analysis prescribed by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*, 467 U.S. 837 (1984). Under the first step, the Court reviews Commerce's construction of a statutory provision to determine whether "Congress has directly spoken to the precise question at issue." *Id.* at 842. "To ascertain whether Congress had an intention on the precise question at issue, [the Court] employ[s] the 'traditional tools of statutory construction.'" *Timex V.I., Inc. v. United States*, 157 F.3d 879, 882 (Fed. Cir. 1998) (citing *Chevron*, 467 U.S. at 843 n.9). "The first and foremost 'tool' to be used is the statute's text, giving it its plain meaning. Because a statute's text is Congress's final expression of its intent, if the text answers the question, that is the end of the matter." *Id.* (citations omitted).

The Court finds that Commerce improperly excluded imputed inventory and carrying costs from "total expenses" when it had included these expenses in "total United States expenses." The plain text of 19 U.S.C. § 1677a provides that Commerce must include imputed credit and inventory carrying costs in "total expenses" when they are included in "total United States expenses." Section 1677a(f)(2)(B) defines "total United States expenses" as the total expenses deducted under § 1677a(d)(1) and (2), that is, commissions, direct and indirect selling expenses, assumptions, and the cost of any further manufacture or assembly in the United States. Section 1677a(f)(2)(C) specifies that:

> [t]he term "total expenses" means all expenses in the first of the following categories which applies and which are incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter with respect to the production and sale of such merchandise . . . .

(emphasis added). Commerce determined that the applicable category of expenses to be used for calculating "total expenses" is §

1677a(f)(2)(C)(i), and it consists of all of "[t]he expenses incurred with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country." 19 U.S.C. § 1677a(f)(2)(C)(i)).

Thus, "total United States expenses" are certain enumerated expenses "incurred by or for the account of the producer or exporter, or the affiliated seller in the United States," *see* § 1677a(d)(1),(2), while "total expenses," in this instance, include

> all expenses . . . incurred by or on behalf of the foreign producer and foreign exporter of the subject merchandise and by or on behalf of the United States seller affiliated with the producer or exporter . . . with respect to the subject merchandise sold in the United States and the foreign like product sold in the exporting country . . . .

*See* § 1677a(f)(2)(C)(i). Reading § 1677a(d) and (f) together makes it apparent that "total expenses" equals "total United States expenses," that is, those expenses incurred in the United States, plus those expenses incurred in France, to produce and sell the subject merchandise in the United States. SNR, therefore, is correct in contending that "total United States expenses" is a subset of "total expenses." Thus, since Commerce determined that imputed inventory and carrying costs were to be included in "total United States expenses," they must be included in "total expenses" as well.[2]

Because the text of the statute resolves the issue, it is unnecessary to proceed any further. Accordingly, the Court remands this issue to Commerce. Commerce is directed to include all expenses included in "total United States expenses" in the calculation of "total expenses."

## IV. *Commerce's Denial of a Partial, Price-based LOT Adjustment to NV for SNR's CEP Sales*

### A. *Background*

#### 1. *Statutory Provisions*

The URAA provides for a specific provision regarding adjustments to NV for differences in LOTs. The statute provides for NV to be based on:

> the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, *to the extent practicable, at the same level of trade as the export price or constructed export price*

---

[2] None of the parties dispute that imputed credit and inventory carrying costs are properly considered United States selling expenses under § 1677a(d)(1994) and, therefore, are a part of "total United States expenses" under 19 U.S.C. § 1677a(f)(2)(B)(1994).

19 U.S.C. § 1677b(a)(1)(B)(i) (emphasis added). The statute also provides for a LOT adjustment to NV under the following conditions:

> The price described in [§ 1677b(a)(1)(B), *i.e.*, NV,] shall also be increased or decreased to make due allowance for any difference (or lack thereof) between the export price and constructed export price and the price described in [§ 1677b(a)(1)(B)] (other than a difference for which allowance is otherwise made under [§ 1677b(a)]) that is shown to be wholly or partly due to a difference in level of trade between the export price or constructed export price and normal value, if the difference in level of trade--
>
> (i) involves the performance of different selling activities; and
>
> (ii) is demonstrated to affect price comparability, based on a pattern of consistent price differences between sales at different levels of trade in the country in which normal value is determined.
>
> In a case described in the preceding sentence, the amount of the adjustment shall be based on the price differences between the two levels of trade in the country in which normal value is determined.

19 U.S.C. § 1677b(a)(7)(A). In sum, to qualify for a LOT adjustment to NV, a party has the burden to show that the following two conditions have been satisfied: (1) the difference in LOT involves the performance of different selling activities; and (2) the difference affects price comparability. *See* Statement of Administrative Action[3] ("SAA") at 829 (stating that "if a respondent claims [a LOT] adjustment to decrease normal value, as with all adjustments which benefit a responding firm, the respondent must demonstrate the appropriateness of such adjustment"); *see also NSK Ltd. v. United States*, 190 F.3d 1321, 1330 (Fed. Cir. 1999) (noting that a respondent bears the burden of establishing entitlement to a LOT adjustment).

When the available data does not provide an appropriate basis to grant a LOT adjustment, but NV is established at a LOT constituting a more advanced stage of distribution than the LOT of the CEP, the statute ensures a fair comparison by providing for an additional adjustment to NV known as the "CEP offset." *See* 19 U.S.C. § 1677b(a)(7)(B). Specifically, the CEP offset provides that NV "shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on the sales of the foreign like product but not more than the amount of such expenses for

---

[3] The Statement of Administrative Action ("SAA") represents "an authoritative expression by the Administration concerning its views regarding the interpretation and application of the Uruguay Round agreements." H.R. Doc. 103-316, at 656 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040. "It is the expectation of the Congress that future Administrations will observe and apply the interpretations and commitments set out in this Statement." *Id.*; *see also* 19 U.S.C. § 3512(d) (1994) ("The statement of administrative action approved by the Congress . . . shall be regarded as an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and this Act in any judicial proceeding in which a question arises concerning such interpretation or application.").

which a deduction is made under [19 U.S.C. § 1677a(d)(1)(D)]." 19 U.S.C. § 1677b(a)(7)(B).

2. *Commerce's LOT Methodology*

During this review, and in several prior reviews, Commerce applied the following LOT methodology. *See Final Results*, 62 Fed. Reg. at 54,055; *Preliminary Results*, 62 Fed. Reg. at 31,571-72. In accordance with § 1677b(a)(1)(B)(i), Commerce first calculates NV based on exporting-country (or third-country) sales, to the extent practicable, at the same LOT as the United States (EP and CEP) sales. *See Preliminary Results*, 62 Fed. Reg. at 31,571. When Commerce is unable to find comparison sales at the same LOT as the EP or CEP sales, it compares such United States sales to sales at a different LOT in the comparison (home or third-country) market. *See id.*

Where the LOT comparison is between NV sales and EP sales (that is, where the first sale in the United States is to an unaffiliated buyer), Commerce compares the unadjusted, NV starting price with the starting EP, without making any adjustments to EP as provided for under 19 U.S.C. § 1677a(c). *See id.* at 31,571.

With respect to the LOT methodology for CEP sales, Commerce first calculates CEP by making adjustments to its starting price under 19 U.S.C. § 1677a(d), but before making any adjustments under § 1677a(c). *See id.* Commerce reasoned that the § 1677a(d) "adjustments are necessary in order to arrive at, as the term CEP makes clear, a 'constructed' EP," that is, it is intended to reflect as closely as possible a price corresponding to an EP between non-affiliated exporters and importers. *Final Results*, 62 Fed. Reg. at 54,058. Commerce then determines the LOT for the "adjusted" CEP sales. See *Preliminary Results*, 62 Fed. Reg. at 31,571.

The next step in its LOT analysis is to determine whether home market sales are at a different LOT than United States (EP or CEP) sales. *See id.* In making such a determination, Commerce examines whether the "home market sales are at different stages in the marketing process than the U.S. [(EP or CEP)] sales," that is, Commerce "review[s] and compare[s] the distribution systems in the home market and U.S. export markets, including selling functions, class of customer, and the extent and [LOT] of selling expenses for each claimed [LOT]." *Id.* If the EP or CEP sales and the NV sales are at a different LOT, and the differences in LOT affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the equivalent LOT of the export transaction, Commerce will make a LOT adjustment under § 1677b(a)(7)(A). *See id.* If there is no pattern of consistent price differences, no adjustment is permitted. *See id.* at 31,572. Finally, for CEP sales, if NV is established at a LOT which constitutes a more advanced stage of distribution than the LOT of the CEP, and if there is no basis for determining whether differences in the LOT between NV and CEP affects comparability of their prices, Com-

merce must make a CEP offset to NV under § 1677b(a)(7)(B). *See id.*

3. *Denial of LOT Adjustment for CEP Sales*

With respect to CEP sales, Commerce found that the same LOT as that of the CEP for merchandise under review did not exist for any respondent in the home market except for certain home market sales of respondent NMB/Pelmac. *See Final Results*, 62 Fed. Reg. at 54,056. Commerce was unable to "determine whether there was a pattern of consistent price differences between the [LOTs] based on respondents' [home market] sales of merchandise under review." *Id.*

In such cases, Commerce looked to alternative methods for calculating LOT adjustments in accordance with the SAA. *See id.* In particular, Commerce noted that the SAA states:

> "if information on the same product and company is not available, the level-of-trade adjustment may also be based on sales of other products by the same company. In the absence of any sales, including those in recent time periods, to different levels of trade by the exporter or producer under investigation, Commerce may further consider the selling expenses of other producers in the foreign market for the same product or other products."

*Id.* (quoting SAA at 830). Nevertheless, Commerce determined that it would have been inappropriate to apply the LOT adjustment calculated for NMB/Pelmac to any other respondent, reasoning that "[b]ecause no respondent reported sales in the same market as NMB/Pelmac (i.e., Singapore), we have not used NMB/Pelmac's data as the basis of a level-of-trade adjustment for any other respondents." *Id.* Consequently, with respect to CEP sales which Commerce was unable to quantify a LOT adjustment, it granted a CEP offset to respondents, including SNR, where the home market sales were at a more advanced LOT than the sales to the United States, in accordance with 19 U.S.C. § 1677b(a)(7)(B). *See id.*

With respect to SNR, Commerce applied a CEP offset to NV for all of SNR's CEP sales. In reaching this result, Commerce first determined for SNR that there was one CEP LOT and two home market LOTs, and that the CEP LOT was not the same as either home market LOT. Commerce could not grant a LOT adjustment because it had no other information to provide an appropriate basis for such an adjustment. Commerce determined that a CEP offset adjustment was appropriate for NV transactions matched to CEP, since these transactions were at a more advanced stage of distribution than CEP. Moreover, contrary to SNR's contentions, Commerce concluded that no provision of the antidumping statute provides for a "partial" LOT adjustment "between two home market [LOTs] where neither level is equivalent to the level of the [United States] sale." *Final Results*, 62 Fed. Reg. at 54,057.

B. *Contentions of the Parties*

SNR contends that Commerce improperly denied a price-based LOT adjustment under § 1677b(a)(7)(A) for CEP sales made in the United States market at a LOT different from the home market sales. *See* SNR's Br. at 14. SNR notes that Commerce found two LOTs in the home market, one corresponding to original equipment manufacturers ("OEM") sales and the other to sales to distributors. *See id.* SNR argues that Commerce should have granted it a partial LOT adjustment based on the price differences between the two levels of trade in the home market. *See id.*

SNR notes that the statute directs Commerce to adjust NV for any difference between CEP and NV "'wholly or partly due to a difference in level of trade'" between CEP and NV. *Id.* at 15 (quoting § 1677b(a)(7)(A)). Thus, SNR claims that a LOT adjustment is appropriate even if the difference between United States price and NV is only partly due to a difference in LOT. *See id.* SNR contends that if it has demonstrated that

> (1) distributor sales are at a more advanced level of trade than OEM sales; (2) both OEM and distributor sales are at a more advanced level of trade than CEP sales; and (3) there is a pattern of consistent price difference between sales of the same products to OEM and distributor customers in the home market

then it is logical to conclude that "the price difference between OEM and distributor sales in the home market at least approximates the level of trade adjustment between CEP sales and home market distributor sales." *Id.* In short, SNR claims that the statute permits "the level-of-trade adjustment [to] be calculated using a reliable approximation of the difference between the prices at the two levels of trade," that is, "by using the price difference between OEM and distributor sales to approximate the difference between CEP and distributor sales." *Id.* at 16.

Commerce claims that it properly denied a LOT adjustment for SNR's CEP sales because SNR failed to establish its entitlement to a LOT adjustment. *See* Def.'s Mem. at 45. Contrary to SNR's reading of § 1677b(a)(7)(A), Commerce asserts that the statute only provides for a LOT price-based adjustment to NV based upon price differences between CEP and NV and does not authorize a LOT price-based adjustment based upon different LOTs in the home market. *See id.* at 47; *see also Final Results*, 62 Fed. Reg. at 54,057 (explaining that Commerce does not read into § 1677b(a)(7)(A)'s "wholly or partly" language the authority to make a LOT adjustment based on differences between two home market LOTs where neither level is equivalent to the level of the United States sale). Commerce, therefore, asserts that since it reasonably interpreted § 1677b(a)(7)(A), the Court should sustain its denial of a LOT adjustment and grant of a CEP offset for all of SNR's CEP transactions. *See id.* at 50.

Torrington generally agrees with Commerce's positions, emphasizing that Commerce: (1) properly denied a LOT adjustment for SNR's CEP sales; and (2) reasonably interpreted § 1677b(a)(7)(A) as not providing for a "partial" LOT adjustment as contended by SNR. *See* Torrington's Resp. at 17-20. Accordingly, Torrington contends that this Court should not disturb Commerce's reasonable interpretation of the statute as applied to the record evidence. See id. at 20.

C. *Analysis*

The Court notes that this issue has already been decided in *NTN Bearing*, 24 CIT at ___, 104 F. Supp. 2d at 125-31. As this Court decided in *NTN Bearing*, Commerce's decision to deny SNR a partial, price-based LOT adjustment measured by price difference between home market LOTs was in accordance with law. There is no indication in § 1677b(a)(7)(A) that the pattern of price differences between two LOTs in the home market, absent a CEP LOT in the home market, justifies a LOT adjustment. Rather, Commerce's interpretation of § 1677b(a)(7)(A) as only providing a LOT adjustment based upon price differences in the home market between the CEP LOT and the NV LOT was reasonable, especially in light of the existence of the CEP offset to cover situations such as those at issue here.

## CONCLUSION

For the foregoing reasons, the case is remanded to Commerce to: (1) annul all findings and conclusions made pursuant to the duty absorption inquiries conducted for the subject review; and (2) include all expenses included in "total United States expenses" in the calculation of "total expenses" for SNR Roulements. Commerce's final determination is affirmed in all other respects.

SNR ROULEMENTS; SKF USA INC., SKF FRANCE S.A. AND SARMA, PLAINTIFFS, *v.* 6. UNITED STATES, DEFENDANT, AND THE TORRINGTON COMPANY, DEFENDANT-INTERVENOR

Consol. Court No. 97-10-01825

ORDER

This case having been duly submitted for decision and this Court, after due deliberation, having rendered a decision herein; now, in accordance with said decision, it is hereby

ORDERED that this case is remanded to the United States Department of Commerce, International Trade Administration, to annul all findings and conclusions made pursuant to the duty absorption inquiries conducted for the subject review in accordance with this opinion; and it is further

ORDERED that this case is remanded to Commerce to include all expenses included in "total United States expenses" in the calculation of "total expenses" for SNR Roulements; and it is further

ORDERED that Commerce's final determination is affirmed in all other respects; and it is further

ORDERED that the remand results are due within ninety (90) days of the date this opinion is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

## ERRATA

*NTN Bearing Corp. v. United States*, Consol. Court No. 97-10-01801, Slip-Op. 00-64, dated June 5, 2000.

Page 9, Line 16: ". . . but see Flora Trade Council v. United States. . ." should be ". . . Floral. . ."

Page 25, Line 11: ". . . Final Results, Fed. Reg. at . . ." should be ". . . 62 Fed. Reg. . . ."

Page 26, Line 16: ". . . Final Results, Fed. Reg. at 54,053 . . ." should be ". . . 62 Fed. Reg. . . ."

Page 67, Line 3: ". . . to the bests of its ability . . ." should be ". . . best . . ."

Page 98, Line 14: ". . . or this Court's reconsideration of it stance . . ." should be ". . . its . . ."

October 11, 2000

# Index

*Customs Bulletin and Decisions*
*Vol. 34, No. 44, November 1, 2000*

## *U.S. Customs Service*

### General Notices



### *CUSTOMS RULINGS LETTERS AND TREATMENT*



### Slip Opinions




Federal Recycling Program
Printed on Recycled Paper
U.S.G.P.O. 2000-472-776-20004